United States Court of Appeals for the Second Circuit

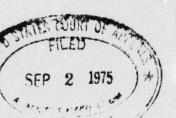


APPELLANT'S BRIEF

ORIGINAL

75-7096

United States Court of Appeals



For the Second Circuit.

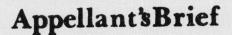
SAMUEL H. SLOAN,

Plaintiff-Appellant,

-against-

CANADIAN JAVELIN LTD., et al.,

Defendants-Appellees.



SAMUEL H. SLOAN
Plaintiff-Appellant
917 Old Trents Ferry Road
Lynchburg, Virginia 24503
(804) 384-1207





INDEX

QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	19
ARGUMENT	• • • • •
I. THE DISTRICT COURT, BONSAL J., ERRED IN SUA SPONTE DISMISSING THE COMPLAINT ON T GROUNDS OF FAILURE TO PROSECUTE	HE 21
A. The pro se plaintiff did not commit procedural errors nor did he willful disobey any order of the court nor d he fail to prosecute and, as a consequence, there is no basis for the di missal of the complaint on this group	ly id - s-
i No prejudice to the defendants resulted from Sloan's failure to appear for oral argument on Janua 14, 1974 and, in fact, Sloan was victim of prejudice since the cou and all moving parties had been i formed that Sloan could not be pron that date and a request for an adjournment of oral argument had denied	the ort on- resent or been
ii. None of the defendants-appellees motion papers which argued that to plaint should be dismissed because had not been timely filed and the the court below should not have of sidered the question of the timel of the filing of the amended comp	the com- se it erefore con- liness
iiiNo undue prejudice to the defendance resulted from the course of the prejudice to the defendance of the defendance of the prejudice to the prejudice to the prejudice to the prejudice to the prejudice of the	pro-
iv The court below should have grand Sloan leave to file an amended complaint at a date later than December 10, 1973 in accordance with Rule F.R. Civ. P. especially in view the conflict in Sloan's schedule	om- mber 15(a) of
vPlaintiff did not fail to comply an order of the court because the was no order of the court	ere

	vi. The decision of the court below must be reversed as being arbitrary and capricious	6
	viiVarious defendants ignored procedure and failed to comply with the rules of the Southern District of New York 3	8
II.	THE AMENDED COMPLAINT OF DECEMBER 29, 1973 DOES STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND DOES MEET THE PLEADING REQUIREMENTS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND THE LAW OF THIS CIRCUIT.	11
	i The doctrine of "in pari delicto" or "unclean hands" does not provide a defense in this case	45
	ii The fact that the business of certain defendants depends on the trust and confidence of their clients does not give them any immunity, qualified or otherwise, from suit	52
i	defeciencies in the complaint are without merit	54
III.	THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO ENJOIN THREE RELITED STATE COURT PROCEEDINGS	59
Iv.	THE DISTRICT COURT ERRED IN DENYING THE MOTION TO CONSOLIDATE	65
v.	THE DISTRICT COURT ERRED IN FAILING TO REACH THE OTHER MOTIONS PRESENTED IN-CLUDING THE MOTIONS BY PLAINTIFF FOR SUMMARY JUDGMENT	66
VI.	THE DISTRICT COURT ERRED IN DENYING SLOAN'S MOTION FOR RELIEF FROM JUDG-MENT, FOR REARGUMENT AND FOR LEAVE TO FILE AN AMENDED COMPLAINT	69
CONCLUETO	N	70
COMCTORIO	14	2-

AUTHORITIES CITED

Affiliated Ute Citizens v United States 406 U.S. 128 (1972)
Anderson v Francis I. DuPont & Co. 291 F. Supp. 705, (D. Minn. 1968)
Atlantic Coast Line R.R. v Brotherhood of Locomotive Engineers 398 U.S. 281 (1970)63
Avery v Merrill Lynch 328 F. Supp. 677 (D.C. Cir. 1971)
Blue Chip Stamps v Manor Drug Stores, 44 L. Ed. 2d 539 (1975.)
Bonime v Canadian Javelin Ltd. (SDNY 1973)18
Brennan v Midwestern Life Ins. Co. 259 F. Supp. 673 (N.D. Ind. 1966)
Capital Serv. Inc. v NLRB 347 U.S. 501 (1954)63
Chartered New England Corp. v Wood, Walker & Co., N.Y. Supreme Court (1973)
Chris Craft Industries Inc. v Independent Stock Comm. 354 F. Supp. 895 (1973)
Colonial Realty Corp. v Bache & Co. 358 F. 2d 178 (2d Cir. 1966), cert. denied 385 U.S. 817 (1966)
Edwards & Hanly v Sloan, N.Y. Sup. 15876, 197315, 20, 59, 60
Eisen v Carlisle & Jacquelin 479 F. 2d 1005 (2d Cir. 1973)
Flaks v Koegel, 504 F. 2d 702 (1974)
Gelb v Zimet Bros. Inc. (1962) 228 N.Y.S. 2d 111, 34 Misc. 2d 401
German v Snedecker (1939) 257 App. Div. 59616, 69
Gordon v New York Stock Exchange, 498 F. 2d. 1303 (2d. Cir., 1974) cert. granted U.S. 42

Scheuer v Rhodes, 416 U.S. 232 (1974)	59
S.E.C. v Capital Gains Research Bureau, 375	50, 55, 58
S.E.C. v Canadian Javelin Ltd. et al, S.D.N.Y. 73 Civil 5074, complaint filed, CCH Fed. Sec. Law Rep. ¶94,226 (1973 transfer binder), judgment entered CCH ¶94,720 (1974 transfer binder), motion to intervene denied CCH ¶94,861 (1974 transfer binder)	1, 17, 18, 65
S.E.C. v National Securities, Inc. 393, U.S. 453,	
(1969)	58
S.E.C. v Sloan 369 F. Supp. 996 (1974)	32, 33
Shapiro v Merrill, Lynch, Pierce, Fenner & Smith, Inc. 353 F. Supp. 264 (1972) aff'd., 495 F. 2d 228 (2d Cir. 1974)	43, 44
Simonian v Crosby D.C. Mass. (1974)	19
Slade v Shearson, Hammill & Co., Inc. F. 2d Cir. decided 12-16-1974)	.42,46
Sloan v Nixon 60 F.R.D. 228 (1973) aff'd. 493 F. 2d 1398 (2d Cir., 1974) aff'd. U.S. 42 L.Ed. 2d 174, rehearing denied U.S. 42 L Ed. 2d 689.	22
Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v Rogers 357 U.S. 197 (1958)	38
Stromillo v Merrill, Lynch, Pierce, Fenner & Smith, Inc. 54 F.R.D. 396 (1971)	55
Strong v France 474 F. 2d 747, (9th Cir. 1973)	
Studebaker Corp. v Gittlin, 360 F. 2d 692,	62
Sugar v Curtis Circulation Co., 377 F. Supp.	58
Supt. of Insurance v Bankers Life & Cas. Co.	58

<u>Tcherapniu</u> v <u>Knight</u> , 389 U.S. 332 (1967)	58
United States v John Anthony Taylor 487 F. 2d 307 (2d Cir. 1973)	36
<u>Vernitron Corp. v Benjamin</u> 440 F. 2d 105 (2d. Cir. 1971)	64
Weis & Baer, Inc. v Sloan, N.Y. Civil 106823/1973	15, 17, 59
Withrow v Larkin,, 43 L. Ed. 2d 712, (1975)	66
CONSTITUTION STATUTES, AND RULES:	
United States Constituti Amendment I	37, 67
Securities Act of 1933,	
§5, 12, 15, 17, 22 (15 U.S.C. 770)	2, 64
Securities Exchange Act of 1934,	
§7 (15 U.S.C. 78g)	60
§9(a) (15 U.S.C. 78 i(a))	2
§10(b) (15 U.S.C. 78j (b))	2, 51, 55
§ 13 (d) (15 U.S.C. 78m(d))	2
§15(c) (15 U.S.C. 780(c))	2
§18(a) (15 U.S.C. 78n(a))	2
§21(e) (15 U.S.C. 78u(e))	62
§27 (15 U.S.C. 78aa)	2
§28(a) (15 U.S.C. 78bb(a))	3
§29(b) (15 U.S.C. 78cc(b))	3, 61, 64
28 U.S.C. 453	23
28 U.S.C. 1292(b)	42
Federal Anti-Injunction Act: 28 U.S.C. 2283	62, 63

CONSTITUTION STATUTES, AND RULES:

Federal Rules of Civil Procedure:
Rule 5(a)
Rule 6(d)40
Rule 7(b)28
Rule 9(b)52, 53
Rule 12(b)40
Rule 15(a)
Rule 41(b)34
Rule 5969
Rule 60(b)35, 69, 70
Rule 77(a)12
Rule 79(a)34
General Rules of the Southern District of New York:
Rule 9(b)39, 40
Rule 9(c)(2)40
Rule 11(a)34
Rule 1334
S.E.C. Rules:
10a-1 (17 C. F.R. 240.10a-1)
10a-2 (17 C.F.R. 240.10a-2)60
10b-5 (17 C.F.R. 240.10b-5)2
15c3-3 (17 C.F.R. 240.15c3-3)2
Regulation T (12 C.F.R. 220.1)60
CPLR 552038
Other Authorities:
31 AT.P. 3d 132216

OTHER AUTHORITIES:

1	Moore	111	0.208	[33]	and	0.224	63
1	Moore	91 91	0.208	[34]	and	0.225	63

The Maw Vork and In City

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN

Plaintiff-Appellant,

-against-

75-7096

CANADIAN JAVELIN LTD., et al.,

Defendants-Appellees.

BRIEF FOR THE PLAINTIFF-APPELLANT

QUESTIONS PRESENTED

- 1. Did the Court below, Bonsal, J., err in <u>sua sponte</u> dismissing the complaint for failure to prosecute?
- 2. Does the amended complaint dated December 29, 1973 state a claim upon which relief can be granted?
- 3. Did the Court below abuse its discretion in denying the motion by the plaintiff for a preliminary injunction enjoining three related state court proceedings?
- 4. Did the Court below err in denying the motion by the plaintiff to consolidate this action with another pending action:
 S.E.C. v Canadian Javelin Ltd. 73 Civil 5074?
- 5. Did the Court below err in denying the motions by plaintiff for summary judgment as to defendants Canadian

that Sloan was entitled to the highest price which the shares

Javelin Ltd., American Stock Exchange, The Miami Herald, Dow Jones & Company, and Edwards & Hanly?

- 6. Did the Court below err in failing to reach the other motions presented?
- 7. Did the Court below err in denying the motion of the plaintiff-appellant for relief from judgment, for reargument and for leave to file an amended complaint?

STATEMENT OF THE CASE

This is an appeal from the order of the Honorable Dudley B. Bonsal, United States District Judge, dismisting plaintiff's complaint and from an order denying relief from ... judgment, reargument and leave to file an amended complaint. The action was brought by Samuel H. Sloan ("Sloan"), a short seller of shares of Canadian Javelin Ltd. ("CJV") (104, ¶172). Jurisdiction was based upon §22 of the Securities Act of 1933 (15 U.S.C. 770) ("Securities Act") and upon §27 of the Securities Exchange Act of 1934 (15 U.S.C. 78aa) ("Exchange Act") and pendent jurisdiction (A-69). The amended complaint dated December 29, 1973 alleged violations by the defendants of §§ 5, 12, 15, and 17 of the Securities Act, §§ 9(a), 10(b), 13(d), 15(c) and 18(a) of the Exchange Act, Rules 10b-5 and 15c-3-3 promulgated thereunder, the rules of the New York Stock Exchange, the American Stock Exchange, the National Association of Securities Dealers, and state law and common law (A-70, 12).

-2-

CJV is the ticker symbol for Canadian Javelin Ltd. on the American Stock Exchange.

The cause of action arose by virtue of the fact that during 1973 Sloan was actively engaged in buying and selling shares of CJV and as of July, 1973, Sloan had a short position of as much as 33,400 shares of that security (A-196, 125). The complaint alleges that on July 3, 1973, CJV closed on the American Stock Exchange ("AMEX") at 7-1/8 (A-199) but that on July 5, 1973, CJV commenced a rapid rise in price. This rise in price continued until July 26, 1973 when CJV traded as high as 14-5/8 (A-104, 173) at which point Sloan had suffered a severe financial loss because of his short position in CJV (A-94, 127). The complaint demands judgment in the amount of the losses sustained by Sloan during 1973 as a result of his short sales in CJV, alleged to be approximately \$170,000, damages sustained by virtue of having been forced out of business, declaratory relief declaring the contracts in CJV void, and compensatory, punitive and exemplary damages.

According to the complaint the rise in price which resulted in the financial loss to Sloan was caused by false and misleading statements made by CJV, by its chairman of the Board and principal stockholder, John C. Doyle ("Doyle"), by its president, William M. Wismer ("Wismer"), by its 61% owned subsidiary, Bison Petroleum & Minerals Ltd. ("Bison"), by the president of Bison, Robert Benoit Major, and by other named defendants. The complaint further alleges that defendants Dow Jones & Co. ("Dow"), The Miami Herald and others had knowledge of and participated in a scheme to manipulate the price of CJV shares and that they published favorable news stories about

^{2.} Although §28(a) of the Exchange Act (15 U.S.C. 78bb(a)) limits recovery to actual damages, a plaintiff can recover punitive and exemplary damages under pendent common law claims. Declaratory relief declaring the contracts void is specifically available under §29(b) of the Exchange Act 15 U.S.C. 78cc(b).

CJV which they knew or should have known were false and misleading while at the same time refusing or failing to publish unfavorable news information about CJV. For example, Dow did not publish the earnings report of CJV dated May 15, 1973 which showed a loss of \$527,714 for the first quarter of 1973 although Dow did publish all earnings reports of CJV which showed a profit (A-202). Furthermore, Dow did not publish a June 20, 1973 UPI news story based on a news conference held in Panama by Fernando Manfredo ("Manfredo") the Minister of Commerce and Industries in Panama, which stated that Panama had postponed for at least two months, while it draws up a new mining code, talks with CJV for a major copper mining session (A-206) and which further stated that Panama "is now thinking of mining the copper itself." (A-207). On the other hand, Dow did publish a story based upon a press release issued by CJV on June 22, 1973 (A-232) which directly contradicted the statements made by Manfredo two days earlier, which stated that CJV was now moving from the exploration stage to that of construction and which contained numerous other false statements of fact. (A-86/8).

On July 5, 1973 the Dow Jones news wire carried a statement that Bison, a 61% owned subzidiary of CJV, had "acquired" from the Government of Panama a 200,000 acre mineral concession. This statement was also published in the Wall Street Journal, a Dow publication, on July 6, 1973. On July 5, 1973, Sloan, who had a substantial short position in CJV shares, (A-91, ¶106) called Manfredo on the telephone in Panama and was informed by Manfredo that the statement carried on the Dow Jones news wire was untrue. Within fifteen minutes after he spoke to Manfredo, Sloan called the Dow office in Montreal, which office was responsible for all news stories concerning CJV, and wound up speaking to Stewart Pinkerton ("Pinkerton") who was the Managing Editor of the Canadian Dow Jones News Service (A-172.

96). Sloan told Pinkerton that he had just spoken to Manfredo on the telephone and had been informed by Manfredo that the news release on the Dow Jones news wire was untrue (A-91). However, Pinkerton expressed a total lack of interest in the matter (A-91). Furthermore, Sloan called Larry Grimes of the S.E.C. and Stephen Gerard of the AMEX and informed them of the substance of his conversation with Manfredo (A-91).

On subsequent dates, Sloan spoke to Tom Mitchell, Nick Thomas and Bob Cameron, reporters for Dow, and informed them of the false and misleading nature of the news stories being published by Dow about CJV (A-91/2). Following this, Pinkerton called Sloan and told Sloan not to speak to Dow Jones staff reporters anymore and that if Sloan had a legitimate news item about CJV he should call Pinkerton exclusively (A-92, ¶112).

After the July 5 news release, CJV began a sudden and swift rise in price. Trading averaged more then 50,000 shares per day and CJV usually was on the most active list of the AMEX. On many days the volume on the Montreal Stock Exchange exceeded the volume on the AMEX. This occured while the rest of the market was suffering a severe decline. (A-93, ¶117).

On July 23, 1973 Sloan wrote a letter to Dow pointing out that July 5 and July 6 statements were untrue and the manner in which they were untrue. (A-93, ¶114). In a reply dated August 6, 1973, a managing editor of Dow stated:

"I believe there is some confusion in your mind between what our story said, and your interretation of what Mr. Manfredo told you." (A-218).

However, on October 25, 1973 and on October 30, 1973, after Sloan had instituted suit against CJV and Dow and after the price

of CJV shares had commenced to decline, Dow published articles which revealed that plaintiff's position had been correct all along.

(A93, ¶116). The first article stated that according to the Government of Panama CJV didn't have gold rights in Panama but that CJV was disputing that fact (A-238). However, in the article of October 30, 1973, Dow reported that CJV admitted that its July 5 announcement had been "premature" (A-237).

On October 25, 1973, following the publication of the unfavorable news story in the Wall Street Journal, trading in CJV was halted by the AMEX at the request of CJV. On November 29, 1973, the S.E.C. instituted its own injunctive suit against CJV and suspended trading in CJV shares. That suspension continued for more than a year.

Sloan was at all times from January to August of 1973 a short seller of CJV shares and made numerous purchases and sales of CJV shares during that period. (A-104, ¶172). At the time of the UPI news release of June 20, 1973, which was published in the Montreal Gazette on June 21, 1973 (A-85, ¶76), Sloan had enterel purchase orders with various members of the AMEX which, had they been filled, would have covered Sloan's entire short position (A-85, ¶77). However, because of the unfavorable news article, an Jfficer of CJV called Steven Gerard of the AMEX and requested that the AMEX halt trading in CJV shares. (A-85, ¶76). As a result, trading in CJV was halted by the AMEX on July 21 and July 22, 1973 (A-199). The complaint alleges that because CJV was halted from trading by the AMEX on these days the normal forces of supply and demand were interrupted and Sloan was prevented from covering his short (A-85, ¶77).

The report of the June 20 press conference was never carried in any American financial publications (A-85, ¶77). Consequently, CJV and the AMEX knew that the general public was not aware of the June 20 press conference in Panama and never became aware of the reason that CJV was halted from trading on June 21, 1973 and June 22, 1973 (A-86, ¶78).

By virtue of his short position in CJV, Sloan owed CJV shares to various brokers. Because of the rise in price of CJV shares, several brokers demanded that Sloan deliver the CJV shares to them. Sloan was unable to deliver these shares (A-104, ¶176). During July and August of 1973 several brokers sent Sloan confirmations indicating that the CJV shares had been bought-in. However, Sloan did not authorize any purchases of CJV shares during this period. (A-105, ¶177). The result was approximately \$170,000 in trading losses assuming that all of the transactions were valid. (A-105, ¶179).

CJV reached its relative peak on Thursday, July 26, 1973 when it traded as high as 14-5/8 (A-199). The next day, Sloan flew to Panama to visit the CJV copper exploration sight (A-95). On Monday, July 30, 1973, when Sloan returned, he was confronted by various stock brokers who demanded collateral against the short sales made by Sloan (A-114, ¶241). Sloan responded to these demands by putting up collateral until the point where his financial resources were expended (A-185, ¶4). At that point Sloan was, on one occasion, forced to call the police in order to have two stock brokers forcably ejected from his office (A-114, ¶241). Meanwhile, the AMEX, without Sloan's authorization, forwarded to Wismer a letter which had been written by Sloan to the AMEX. In a letter dated August 3,

1973, Wismer informed Sloan of his receipt from the AMEX of Sloan's letter and stated that in view of Sloan's visit to "Canadian Javelin's Cerro Colorado opper properties on July 28" that he would hold Sloan "responsible for the authenticity of any information which [Sloan] might see fit to disseminate" (A-226).

On August 15, 1973 Sloan borrowed 1,000 shares of CJV from Merrill, Lynch, Pierce, Fenner & Smith, Inc. and delivered them to Edwards & Hanly ("Edwards"). However, Edwards refused to pay for the shares and refused to return the shares to Sloan (A-115, %243). This illegal act caused a severe financial crisis. (A-115, %245). As a result of these events, plaintiff was forced to close his office and to go out of business. His last day in business was August 16, 1973 (A-116, %246).

On September 4, 1973, Sloan filed a complaint in the United States District Court for the Southern District of New York under the docket number 73 Civil 3801. This complaint alleged violations of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78a) on the part of the nine named defendants. Two of these defendants, Standard & Poor's Corporation ("S & P") and CJV moved to dismiss. A third defendant, the AMEX, "joined" in the motions of S & P and CJV to dismiss without serving and filing a timely notice of motion and without serving and filing a supporting brief (A-18-9). On October 25, 1973, the return date of this motion, a fourth defendant, Dow, attempted to "join" the other three defendants by moving to dismiss without submitting any motion papers to the court. However, the district court, Bonsal, J., would not receive an oral motion.

The motions which were made on October 25, 1973 were never decided by the court. In the meantime, on October 12, 1973, Sloan had filed a complaint under a second docket number: 73 Civil 4403. This second complaint was similar in many respects to the first complaint except that it included as new defendants seventeen stock brokerage firms to or through whom Sloan had sold shares of CJV (A-14) or who were otherwise alleged to be involved in a conspiracy to manipulate the market in shares of CJV. On November 19, 1973, three of these brokers moved to dismiss. A fourth broker, Loeb, Rhodes & Company ("Loeb") submitted motion papers on a motion to dismiss but failed to appear in court on the return date of the motion. The only attorneys present on November 19, 1973 were Henry Friedberg representing defendant Muiler & Company and Leonard Toboroff representing defendants Chartered New England Corporation and

^{3.} In an opinion of May 30, 1974, Judge Bonsal disposed of all motions which were then pending. This opinion might arguably be said to constitute the decision of the motions which were originally made on October 25, 1973.

F. S. Moseley, Estabrook & Co., Inc. on this occasion, Judge Bonsal stated that neither the complaint filed under 73 Civil 3801 nor the complaint filed under 73 Civil 4403 met the pleading requirements under the Federal Rules of Civil Procedure because they failed to plead the circumstances constituting fraud with particularity. Judge Bonsal emphasized the words "with particularity." Judge Bonsal also expressed dissatisfaction with a proposed amended complaint bearing the date November 4, 1973 which had been submitted to the court ex parte with a proposed order attached in an effort by plaintiff to amend the complaint in 73 Civil 4403 before a responsive pleading had been served. This could have been done in accordance with Rule 15 (a) F.R. Civ. P. Judge Bonsal then told Sloan that he would have twenty days to file an amended to dismiss complaint and that the Court would hold all motions in abeyance until the twenty day period had expired at which time these motions could be renewed or reconsidered as appropriate. Judge Bonsal also barred discovery during this twenty day period. When Sloan inquired as to the docket number under which he should file this new complaint, Judge Bonsal stated that he was not going to give the plaintiff legal advice.

^{4.} Sloan, of course, was present but was not an attorney.

^{5.} Judge Bonsal did not sign the proposed order and therefore this proposed amended complaint is not part of the record before this court in accordance with the rules relating to unsigned orders. Nevertheless, this court can read this "proposed amended complaint" because Loeb attached a copy in its motion which became returnable on January 14, 1974 to dismiss the "proposed amended complaint." (See A-45 to A-64). Judge Bonsal refers to the proposed amended complaint (which he calls the "third complaint") several times in his Opinion of May 30, 1974.

The statement made by Judge Bonsal on November 19, 1973 was an oral directive. No court stenographer was present. No order was entered memoralizing Judge Bonsals decision. Consequently, none of the parties who were not represented on November 19, 1973 were privy to what had been decided on that date. Presumably, however, the other defendants were notified of the decision of the Court by Judge Bonsal's then law clerk, Mr. Robert Barrett. From that point on, all of the parties communicated their views or were informed of what progress had been made in this case by speaking to the Judge Bonsal's law clerk on the telephone. On December 6, 1973 Sloan called Judge Bonsal's chambers to say that he could not possibly file an amended complaint by December 10, 1973 and that he wanted an extension of time. The judge's law clerk advised Sloan that such a request should be made in writing. Sloan then wrote a letter requesting an extension of time to file an amended complaint and subsequently sent a copy of this letter to all parties who appeared. Upon receipt of this letter, Judge Bonsal's law clerk informed Sloan that Judge Bonsal would not formally grant an extension of time to file the amended complaint and that, in view of the situation, Sloan should simply file his amended complaint as soon as he had it ready.

^{6.} It is regretable that it is necessary to refer in a legal brief to what the judge's law clerk said on the telephone to a litigant. However, it should be obvious from the record that all parties and not just Sloan relied upon pronouncements from the judges law clerk for guidance in this case. Consequently it would be a mistake to omit to state the key role which the judges law clerk played in this case.

Sloan did, in fact, file the amended complaint on the morning of Saturoay, December 29, 1973, by leaving it with the officer on duty in the clerks office in room 601 of the U.S.

Courthouse. This was done at the suggestion of Judge Bonsal's law clerk, who was working that 3aturday and who advised Sloan of Rule 77(a) F.R. Civ. P., which states that "the district courts shall be deemed always open for the purpose of 'ing any pleading." Judge Bonsal's law clerk also told Sloan that Judge Bonsal would endorse on the back of the amended complaint an order granting leave to file and that Sloan need not prepare an order for this purpose. After notifying Judge Bonsal's law clerk that he was going on a vacation, Sloan caught an airplane to Iceland (which happened to be the last airplane going to Iceland that year). After traveling around Europe, Sloan returned to the United States on February 11, 1974.

Meanwhile, on January 14, 1974, several defendants moved to dismiss. None of these motions to dismiss were directed at the amended complaint dated December 29, 1973 since that amended complaint was not served by the U. S. Marshall until after most of the motion papers were filed with the court. To be specific, the amended complaint was served in most cases during the week of January 7-11, 1974, whereas the motion papers on motions to dismiss were filed during the first four days of January, 1974, except for the motion papers submitted by defendant AMEX, which did not submit it's motion papers until January 11, 1974 or three days before the return date of the motion (A-121). All of the parties appearing in the case were notified of this motion date and were present on January 14, 1974. This was in contrast to the previous motion date of November 19, 1973, where only two opposing attorneys were present.

Thus, on January 14, 1974, fifteen attorneys were present representing the various defendants and the only interested person not present was the plaintiff, who was in Stockholm, Sweden. However, the plaintiff sent a clerk, Richard Ilson, who advised the court that the plaintiff was in Stockholm, Sweden and had learned of the new motions to dismiss to late to return and appear in court on that date. Three days later, the plaintiff called the judges law clerk by long distance telephone from Helsinki, Finland and was advised that, in view of the fact that the return date for the motion had already passed, no purpose would be served by a return to the United States at that point.

finally made in his decision in this case, various motions were made by different parties to this action. Most, but not all, of these motions were summarized by Judge Bonsal in his subsequent opinion. On January 9, 1974, defendant Bache & Company had obtained a default judgment by the clerk in this amount of \$31,606.03 plus interest on its counterclaim against Sloan (A-122). Sloan moved to vacate the default judgment and for a default judgment against Bache & Company on the grounds that Sloan was not in default, but rather that Bache & Company was in default for its failure to answer the amended complaint dated December 29, 1973. Wright Engineers Ltd. ("Wright") moved to dismiss on the grounds that Wright did business outside of the territorial boundaries of the United States and that therefore the district court lacked personal

Jurisdiction as to Wright. Miller-Freeman Publication, Inc.

("Miller"), who was not named as a party defendant to this action, moved to dismiss on the grounds that the correct defendant was another defendant bearing the same name. Pressman, Frohlich & Frost, Inc. ("Pressman"), who was simultaneously suing Sloan in the Civil Court of the City of New York, moved to enjoin Sloan from harassment and annoyance of Pressman.

In addition, Sloan also moved for summary judgment as to various defendants. One of these defendants, the Miami Herald, then cross moved for summary judgment. There was no oral argument or court appearances on any of these motions.

All of these motions presented were decided in an opinion of Judge Bonsal dated May 30, 1974. Following this opinion, Sloan moved for relief from judgment, for re-argument and for leave to file an amended complaint. This motion was denied without opinion. Those two decisions now form the basis of this appeal. The opinion of the court below is reported in the CCH Fed. Sec. Law Rep. ¶ 94, 579 (1973-74 transfer binder).

RELATED PROCEEDINGS

While the proceedings described above were taking place, there were a number of proceedings pending before different judges of various courts which were related to the action at the bar and a brief review of these proceedings is appropriate.

Several related proceedings were commenced in the Civil
Court of the City of New York, County of New York and in the
Supreme Court for the State of New York, County of New York.
The earliest of these dated back to August 3, 1973. In one
case, an involved broker sued another without naming Sloan as
a defendant. After Judge Bonsal denied Sloan's motion to
enjoin these state court proceedings, Sloan moved this court to
enjoin the three remaining proceedings which were: Edwards
& Hanly v Sloan, N. Y. Supreme 15876/1973; Pressman, Frohlich
& Frost, Inc. v Sloan, N. Y. Civil Court 97176/1973 (see
A-371-2) and Weis & Baer, Inc. v Sloan, N. Y. Civil Court
106823/1973. The motion to enjoin these state court proceedings
was denied on October 29, 1974. The next day, one of these
cases, Edwards & Hanly v Sloan, went to trial.

In Edwards & Hanly v Sloan, Edwards sued for \$6,611.42 for "breach of brokerage contract" and for injury resulting from unspecified violations of the Exchange Act (A-289). Sloan countersued for \$18,000, alleging that on August 15, 1973 Sloan had delivered to Edwards 1,900 shares of CJV after Sloan had calledEdwards and had obtained a promise by Edwards to pay Sloan approximately \$13,000 immediately upon delivery. The counter claim further alleged that after the shares were delivered, Edwards refused to make payment and refused to return the shares to Sloan (A-292-7). Sloan sued Edwards for \$18,000 on the

^{7.} Chartered New England Corp. v Wood, Walker & Co., N. Y. Supreme Court.

theory that Edwards had converted the 1,000 shares of CJV and that Sloan was entitled to the highest price which the shares of CJV had reached within a reasonable time after the shares had been converted which was the price of 18 achieved by CJV on September 14, 1973. Sloan also sued Edwards for compensatory damages of \$2,000,000 and punitive and exemplary damages of \$5,000,000 based upon a theory of tort, fraud, and conversion (A-296).

During the course of a two day trial before New York State Supreme Court Judge Shanley Egeth, the Court dismissed Sloan's counterclaims of a total of \$7,000,000 in compensatory, punitive and exemplary damages and reduced his remaining claim from \$18,000 to \$13,000 (A-356). In addition, Edwards reduced its claim by \$347, which represented commissions on the buy-in of the shares of CJV (A-355). Subsequently, in an eight page memorandum decision handed down on November 26, 1974, Judge Egeth decided that Edwards was entitled to judgment in the amount of \$6,264.11 (that is \$6,611.42 minus \$347) plus interest and Sloan was entitled to judgment in the amount of \$13,000 plus interest (A-364). The court also decided that Edwards was to pay Sloan the difference. On December 9, 1974, judgment was entered in which it was adjudged that Edwards was to pay Sloan the sum of \$7,267.02. Both sides filed notices of appeal. On May 27, 1975, in a two page decision, the Appellate Division modified the decision of the

^{8.} This was founded upon the "New York Rule" regarding the conversion of objects with a fluctuating market value.

See German v Snedecker (1939) 257 App. Div. 596;

Hayward v Edwards, 4 N.Y.S. 2d 699, 167 Misc. 6941;

Gelb v Zimet Bros. Inc. (1962) 228 N.Y.S. 2d 111, 34

Misc. 2d 401. See also the discussion of this rule found at 31 ALR 3d 1322.

trial judge by dismissing the counter claim of Sloan and adjudging that Edwards recover from Sloan the sum of \$5,662.50 (A-368-9). Sloan has filed a notice of appeal to the State of New York Court of Appeals.

In Pressman, Frohlich & Frost, Inc. v Sloan, supra,
Civil Court Judge Albert P. Williams accorded summary judgment
in favor of the plaintiff in a two page decision dated January
11, 1974 (A-370-1). Subsequently, Sloan filed a Notice of
Appeal.

In Weis & Baer, Inc. v Sloan, supra, the plaintiff obtained a default judgment against Sloan although the summons and complaint were never served upon Sloan. The judgment has never been served on Sloan. No further proceedings have been had in that action.

On November 29, 1973, the S.E.C. commenced its own civil action against CJV and two of its officers, John C. Doyle ("Doyle") and William M. Wismer ("Wismer") alleging various counts of stock fraud and market manipulation. Sloan moved to consolidate that action, S.E.C. v Canadian Javelin Ltd. et al, SDNY 73 Civil 5074 (summary of complaint, CCH Fed. Sec. Law Rep. ¶ 94,226, (1973 transfer binder)), with the action before Judge Bonsal. That motion was denied by Judge Bonsal as part of the opinion of May 30, 1974. On August 17, 1974, the action between the S.E.C. and CJV was settled with consent orders of permanent injunction entered as to CJV and Doyle.

CCH Fed. Sec. Law Rep. ¶ 94,220 (1973-4 transfer binder).

Sloan promptly moved to intervene, to vacate the consent order of permanent injunction, and for an order halting the suspension of trading in CJV. That motion was denied by Judge Mac Mahon on October 29, 1974 (CCH Fed. Sec. Law Rep. ¶94,861 (1974

transfer binder)) and a notice of appeal was filed by Sloan.

Contemporaneous with the filing of its complaint in S.E.C. v Canadian Javelin Ltd., the S.E.C. suspended trading in CJV estensibly for the purpose of allowing time for information concerning the S.E.C.'s lawsuit to be disseminated to the public. This suspension of trading was continued for consecutive ten day periods until trading was finally permitted to resume on January 27, 1975. While that suspension of trading was in effect, Sloan filed a petition for review in the U.S. Court of Appeals for the Second Circuit of the orders of the S.E.C. suspending trading in CJV. That petition for review, filed under the docket number 74-2457, is still before this court. Meanwhile, on April 2. 1975 the S.E.C. re-suspended trading in CJV and that suspension continues to the present.

Shortly after the S.E.C. suspended trading in CJV, at least three class action lawsuits were commenced for injury allegedly sustained by members of the purported class as the result of wrongful conduct on the part of CJV and its officers. In the annual proxy statement issued by CJV a total of 12 lawsuits were reported which named CJV as a defendant. Included among these were Bonime v Canadian Javelin Ltd. and Horvath Trading Co. v Javelin Paper Corporation Ltd. which were pending in the Southern District of New York; Lurie v Canadian

Javelin Itd. which was pending in the Northern District of
Illinois and Simonian v Crosby which was pending in the
United States District Court of Massachusetts. In addition,
actions against CJV were pending in the Circuit Court of Cook
County, Illinois, in the New York State Supreme Court, in the
Federal Court of Canada, in the Supreme Court of Newfoundland,
and in the Superior Court of Montreal.

SUMMARY OF ARGUMENT

While sharply critical of the pro se plaintiff, Judge Bonsal, in his opinion of May 30, 1974, repeatedly mistated the facts and circumstances of this case which led up to his decision. There is no basis to the statement by the Court that Sloan made "frivolous" court filings and committed procedural errors. In fact, Judge Bonsal himself was responsible for most of the procedural errors which created a confused situation. The principal error was that on November 19, 1973 Judge Bonsal directed the pro se plaintiff to file an amended complaint although Sloan had not moved for leave to file an amended complaint. In addition, only three opposing parties were represented in Court on November 19, 1973 and Judge Bonsal never signed an order granting leave to file an amended complaint. Thus, Sloan was put to the task of doing something that was procedurally impossible to do, namely that of filing an amended complaint without obtaining an order granting leave to file an amended complaint. This otherwise impossible task was

accomplished with a little help from Judge Bonsal's law clerk who recommended that Sloan file the amended complaint with the clerk on duty in Room 601 on Saturday, December 29, 1974, a day when the rest of the clerk's office was closed.

By the time Judge Bonsal rendered his opinion, the case was in such a posture that, regardless of what Judge Bonsal decided, one side or the other would appear to have suffered from prejudice. Since almost all of the defendants took the position that the amended complaint had never been filed, only a few defendants were in a position to file a motion to dismiss the amended complaint. Thus, since the Court decided that the amended complaint had been properly filed, the Court had to consider the adequacy of the amended complaint without giving the opposing parties the opportunity to express their views. This state of affairs led Judge Bonsal to dismiss the complaint sua sponte for failure to prosecute. In so doing, Judge Bonsal erred. Furthermore his opinion is so unclear that it is impossible to determine precisely what Judge Bonsal decided. In a vague statement contained in the last page of his opinion, Judge Bonsal seemed to say that the amended complaint failed to state a claim. However, the Opinion of Judge Bonsal was not clear on this point. It is submitted that if Judge Bonsal ruled that the complaint failed to state a claim, he was in error. For example, paragraphs 242-246 of the amended complaint were virtually identical with a counter claim made by Sloan in Edwards & Hanly v Sloan, supra which counter claim resulted in

a judgment in the amount of \$13,000 plus interest in favor of Sloan. In the action at the bar, Sloan essentially alleged causation in fact although the leading case which firmly established the applicability of that doctrine had not been handed down at the time the amended complaint was written. Sloan was a short seller of shares of CJV. From July 5, 1973 until July 26, 1973 these shares doubled in price. As a result of this rise in price, Sloan suffered injury. The rise in price is alleged to have been caused in fact by the wrongful conduct of various defendants who either knowingly issued false and misleading statements or who knowingly assisted or aided their publication in the financial media and elsewhere or who otherwise participated in the fraud by CJV. Under these circumstances, Sloan was entitled to recover damages resulting from this injury.

ARGUMENT

I

THE DISTRICT COURT, BONSAL, J., ERRED IN SUA SPONTE DISMISSING THE COMPLAINT ON THE GROUNDS OF FAILURE TO PROSECUTE.

Although it is clear from the opinion of Judge Bonsal of May 30, 1974 that the complaint was dismissed, it is less clear as to what the entire reason for this dismissal was. The opinion of Judge Bonsal contained a variety of observations about pleadings and securities law in general but it did not explain how these observations logically lead to the decision to dismiss the complaint. For example, at one point Judge Bonsal indicated that the doctrine of "unclean hands" would

act as a barrier to recovery on the part of the plaintiff in this suit. However, Judge Bonsal did not state that this was the reason that the complaint was dismissed. Furthermore, at one point Judge Bonsal observed that lawsuits of this nature can damage the reputation of accountants and others; but again he did not state that this formed the basis for the dismissal of the complaint.

A careful reading and re-reading of Judge Bonsal's decision leads one to the conclusion that the complaint was dismissed solely for failure to prosecute and this portion of this brief will be based on that presumption.

A

THE PRO SE PLAINTIFF DID NOT COMMIT ANY PROCEDURAL FRRORS NOR DID HE WILLFULLY DISOBEY ANY ORDER OF THE COURT NOR DID HE FAIL TO PROSECUTE AND, AS A CONSEQUENCE, THERE IS NO BASIS FOR THE DISMISSAL OF THE COMPLAINT ON THIS GROUND.

From the first sentence of his opinion, the focus of Judge Bonsal's decision is upon the character of the pro se plaintiff. It would seem from Judge Bonsal's opinion that the pro se plaintiff has committed a variety of misdeeds. These range from a desire to cooperate with the S.E.C. which is "of recent vintage" to a decision to institute suit against the President of the United States. Fortunately for our system

^{9.} See Sloan v Nixon 60 F.R.D. 228 (1973) aff'd 493
F. 2d 1398, (2d Cir., 1974) aff'd U.S.
42 L. Ed. 2d 174, rehearing denied U.S., 42
L Ed. 2d 689.

of justice, the existance of character defects on the part of plaintiffs in litigation do not form the basis for a dismissal of suits. In fact, under 28 U.S.C. 453, every judge of the United States must swear that he "will administer justice without respect to persons."

Turning to the specific circumstances of this lawsuit, the opinion of Judge Bonsal critizes Sloan for procedural errors and frivolous court filings. It is submitted that here Judge Bonsal was in error. An examination of the original record on appeal will reveal that Sloan did not commit the procedural errors which Judge Bonsal says he committed.

The principal holding by Judge Bonsal is that Sloan failed to prosecute in that he filed an amended complaint 19 days late. In addition, Judge Bonsal implied that Sloan inconvenienced 15 other attorneys in this case and acted in a manner prejudicial to them by failing to appear for oral argument on various motions returnable on January 14, 1974. It is submitted that neither of these holdings have any basis in fact or law.

i

NO PREJUDICE TO THE DEFENDANTS RESULTED FROM SLOAN'S FAILURE TO APPEAR FOR ORAL ARGUMENT ON JANUARY 14, 1974 AND, IN FACT, SLOAN WAS THE VICTIM OF PREJUDICE SINCE THE COURT AND ALL MOVING PARTIES HAD BEEN INFORMED THAT SLOAN COULD NOT BE PRESENT ON THAT DATE AND A REQUEST FOR AN ADJOURNMENT OF ORAL ARGUMENT HAD BEEN DENIED.

The court below mistated the facts in the opinion of May 30, 1974 when it said that Sloan had notice that various motions to dismiss were made returnable on January 14, 1974. Although this may have been technically true, the notice which Sloan received came during the course of a long distance call Sloan made from Europe only a few days before the return date of these motions to dismiss. Obviously, no motions papers or motions to dismiss the amended complaint of December 29, 1973 were served on Sloan on or before December 29, 1973, the date on which Sloan left the United States for Europe. The docket sheet reveals that the motion to dismiss by defendant Pressman was filed on January 2, 1974, the motion to dismiss by defendants S & P and CJV were filed on January 4, 1974, the motions to dismiss by defendant Edwards was filed on January 8, 1974 and the affidavit in support of a motion to dismiss, without a formal notice of motion, was filed by defendant AMEX on January 11, 1974. All of these motions were made returnable on January 14, 1974 even though no effort was made to accord the plaintiff the required ten days notice in the latter two cases. The reason for this was that Judge Bonsal's law clerk, Mr. Robert Barrett, advised the various defendants by telephone that on this date Judge Bonsal would be receiving any renewals of motions which had been previously held in abeyance. However, before Sloan left for Europe, he advised Mr. Barrett that he was going to te out of the United States for at least a month. Furthermore, on Friday, January 11, 1974, Sloan's clerk, Richard Ilson, who was receiving Sloan's mail while Sloan was in Europe, called Judge Bonsal's chambers and also called all of the parties defendant AMEV treated this lawsuit

who had timely moved to dismiss in an effort to obtain an adjournment of the return date of these motions. The grounds for this request was that Sloan would not be able to attend. All of these requests for an adjournment were denied. Clearly, an identical request by an attorney would have been granted by the Court unless Judge Bonsal is different from all other judges with respect to such matters. Thus, it was the plaintiff and not the defendants who suffered from prejudice.

In any event, the opportunity to present oral argument is a privilege which is accorded by the court. By failing to be present on January 14, 1974, Sloan merely waived that opportunity to present his side of the case. Nobody was inconvenienced by Sloan's failure to appear and surely this failure does not warrant dismissal of the complaint. Furthermore, the fact that Sloan was not an attorney was prejudicial to him in another way because, had he been an attorney, he could have hired another attorney to appear in his behalf while he was away.

ii

NONE OF THE DEFENDANTS-APPELLEES SUBMITTED MOTION PAPERS WHICH ARGUED THAT THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT HAD NOT BEEN TIMELY FILED AND THEREFORE THE COURT BELOW SHOULD NOT HAVE CONSIDERED THE QUESTION OF THE TIMELINESS OF THE FILING OF THE AMENDED COMPLAINT.

The argument that the amended complaint had not been

^{10.} For example, in this Court, a motion was set down for oral argument on Tuesday, October 22, 1974. However, on Friday, October 17, 1974, Margaret Filson of Patterson, Bellknapp & Webb, representing defendant Dow, moved to adjourn oral argument on the grounds that she was going to be in Europe on October 22, 1974. This motion was expeditiously granted by this Court.

timely filed was not advanced in writing by any of the defendants-appellees. One reason the defendants-appellees did not advance the argument that the plaintiff had filed the amended complaint 19 days late is that with a few exceptions the defendants-appellees failed to acknowledge that that the amended complaint had been filed at all. After being served by the U.S. Marshall, several defendants mailed the amended complaint back to Sloan with a covering letter attached stating that they were treating the amended complaint as a nullity. Copies of several of these covering letters were mailed to Judge Bonsal and have become part of the original record on appeal. Other defendants-appellees chose to ignore the amended complaint altogether and did not communicate with Sloan or the Court. Still other defendants who were properly served either asserted as an affirmative defense that the amended complaint had not been properly filed or else defaulted and did not appear and answer. All of this occured because Judge Bonsal failed to do what his law clerk had told Sloan he would do, namely: endorse an order on the back of the amended complaint granting leave to file.

The defendants-appellees who addressed themselves to the amended complaint of December 29, 1973 all stated that this amended complaint had not been filed because no order of the court had ever been entered granting leave to file an amended complaint. Undoubtedly, most, if not all, of the defendant-appellees were informed by Judge Bonsal's law clerk or by speaking to each other that in November, 1973, Judge Bonsal had

directed Sloan to file an amended complaint. However, they failed to acknowledge this fact since no order had been entered reflecting this directive.

In this respect, Judge Bonsal mistates the facts and circumstance of this case many times in his opinion. To begin with the opinion states:

"At oral argument on November 19, 1973, with plaintiff present, the court denied the defendants' motions to dismiss without prejudice to renewal, and granted leave to the plaintiff to serve and file a 'final' amended complaint within twenty days."

This is not exactly what happened. To begin with, the only parties in a position to know what happened on November 19, 1973 were the parties who were represented in court on that date. Since there were, in fact, only two opposing attorneys present out of the nineteen attorneys and law firms who ultimately appeared in this case, the other seventeen are in no position to argue the correctness of this representation as to what Judge Bonsal said. As noted previously, no court stenographer was present and no order was entered with the clerk reflecting what ever it was that Judge Bonsal said on November 19, 1973.

In a later page of his Opinion, Judge Bonsal states:

"Defendants also move to dismiss the amended complaint of December 29, 1973 on the grounds that it was not filed until after the twenty-day period had expired and that it is therefore untimely."

However, Judge Bonsal's decision fails to state "with 11 particularity" which defendants made a motion on this grounds.

^{11.} Significantly, Judge Bonsal's Opinion fails even to note the appearances in this case.

It is submitted that none of the defendants-appellees made such a motion. In fact, as noted previously most of the defendants-appellees treated this amended complaint as a nullity, not because it had been filed late, but on the theory that it had not been filed at all.

Judge Bonsal's Opinion goes on to say that:

"Defendants, however, contend in support of their motion to dismiss the amended complaint of December 29, 1973 that plaintiff had no adequate excuse for his failure to comply with this courts order of November 19, 1973 and that the numerous complaints and motions filed by the plaintiff have caused them undue prejudice."

Again, none of the defendants-appellees made such an argument and none of the defendants-appellees were in a position to make such an argument. It is submitted that it is erroneous for a judge to consider arguments not made during the course of a proceeding particularly where, as here, the defendants are adequately represented.

It is true that at oral argument on January 14, 1974 several attorneys objected to the filing of the amended complaint and several other attorneys complained that they had not yet received it (A-126-133). However, these objections were not made in writing. Under Rule 7(b) F.R. Civ. P. all motions must be made in writing and must be accompanied by a written notice of the hearing of the motion. This is not just a technical requirement. Sloan was not present on January 14, 1974. Furthermore, Sloan did not know that the court had departed from its usual practice and had ordered that a stenographic record be kept of the oral argument on January 14, 1974. In fact, Sloan was not aware of the existance of such a stenographic record until a very recent date when one of the defendants ordered

that that record be transcribed in connection with this appeal.

iii

NO UNDUE PREJUDICE TO THE DEFENDANTS RESULTED FROM THE COURSE OF THE PROCEEDINGS IN THE COURT BELOW.

Apparently some of the defendants argued that this lawsuit was placing an unfair burden on them. This was not the case. With a few unimportant exceptions, none of the defendants responded to more than one of the complaints. For example, on September 4, 1973, the plaintiff filed a complaint under the docket number 73 Civil 3801 and subsequently, on October 12, 1973, the plaintiff filed a second complaint under the docket number 73 Civil 4403. The complaint named eight of the original nine defendants; the remaining defendant having been stipulated out of the action. However, none of the eight defendants who were named in both complaints ever filed an answer or responsive pleading to the second complaint. Consequently, no prejudice to any existing defendants resulted from the filing of the second complaint.

Sloan found it necessary to file the second complaint 12. under a new index number because several brokers either had sued or were threatening to sue Sloan in the state courts and Sloan felt it necessary to institute suit against the brokers in the federal courts in order to avoid being embroiled in perhaps a dozen state court suits where he would be barred from asserting so-called federal defenses. This explains the fact that Sloan felt he could not wait several weeks or months for leave to file an amended complaint in the first suit but instead purchased a new docket number and filed a new complaint. Sloan also took care to see to it that the second suit was assigned to Judge Bonsal thereby minimizing any possible inconvenience to the existing defendants.

As to the third complaint, it was never filed. One of the "unimportant exceptions" referred to in the preceeding paragraph came when defendant Dow filed an answer to this proposed amended complaint although under no obligation to do so. (A-35-39).

Consequently, the statement near the end of Judge Bonsal's opinion that:

"plaintiff....had three opportunities to frame an adequate complaint prior to the courts' granting him his final opportunity on November 19, 1973."

is incorrect and misleading. To begin with, Judge Bonsal said nothing on November 19, 1973 about this being the plaintiff's "final" opportunity. The impression created by this and other statements in the opinion of the Court is that certain of the defendants were put to the task of having to respond to four successive complaints. This was not the case. In addition, the statement that:

"...each of the 48 defendants in this action has been required to engage in costly and time consuming motion practice in responding to plaintiff's complaints...."

is similarly inaccurate. In fact, sixteen of the forty-eight named defendants never appeared or answered. Another defendant, Pickands Mather & Company, Inc., obtained from the court successive extentions of time to answer (A-179), the last of which gave it until ten days after the court ruled on the then pending motions to dismiss. In addition, although nineteen attorneys appeared in this case, including most of the major law firms in New York City, mary stayed on the sidelines and the overwhelming burden of the defense was carried by perhaps

three law firms, principal among them being Diamond & Golomb, who appeared on behalf of CJV and five other defendants. Although the clients of Diamond & Golomb can perhaps claim to having been put to substantial expense in the defense of this action, it would appear from the papers filed in court that few if any of the remaining defendants can make this claim. For example, the AMEX, which was named as a defendant in each of the four complaints, filed no more than seven sheets of paper in connection with this entire lawsuit. (See A-18-9, A-121). There may, of course, have been meetings, conferences, research and other behind the scenes activity not reflected in the papers filed in court and for which the attorneys in question may have justifiably charged their clients, but the statement by Judge Bonsal that the complaint should be dismissed because of the cost which the defendants have been required to bear is without basis. In addition, one reason for the high cost of the defense of this action is the number of attorneys who appeared. Notwithstanding the fact that these were 48 named defendants in the final complaint, the number of counsel who appeared in this case is surprising and certainly was out of the control of the plaintiff.

The constitution of the United States guarantees a republican form of government. If there is to be a republican form of government there must be litigation. Thus, a defendant who is required to hire an attorney to defend himself in a lawsuit, however frivolous, can be seen as paying his dues for the right to live under the constitution. Therefore, Judge Bonsal's presumption, expressed on pages 15 and 16 of his

decision, that the complaint should be dismissed because or the costs which the defendants will be required to bear of which they have borne already, is contrary to the principles of free government.

iv

THE COURT BELOW SHOULD HAVE GRANTED SLOAN LEAVE TO FILE AN AMENDED COMPLAINT AT A DATE LATER THAN DECEMBER 10, 1973 IN ACCORDANCE WITH RULE 15(a) F.R. CIV. P. ESPECIALLY IN VIEW OF THE CONFLICT IN SLOAN'S SCHEDULE.

It is submitted that the contention by Sloan that he could not devote his full attention to preparing the amended complaint because he was also preparing to defend himself as a pro se defendant in the trial of S.E.C. v Sloan, S.D.N.Y. 71 Civil 2695 was valid and should not have been rejected by the court. In S.E.C. v Sloan, the decision of which was reported in 369 F. Supp. 996 (1974), the trial was scheduled to begin on December 10, 1973, and did, in fact, commence the next day. The statement of Judge Bonsal directing Sloan to file an amended complaint within twenty days was unexpected by Sloan who had not moved for this relief. At oral argument on November 19, 1973, Judge Bonsal did not inquire of Sloan the date when it would be convenient for him to file an amended complaint. It is submitted that in this respect, Judge Bensal acted in a manner which was unfair and prejudicial. Attorneys are constantly asking their adversaries and the courts for extensions of the time required to perform various tasks. Lawsuits frequently drag on for months and years because of extensions of time. However, Sloan, solely because he was not an attorney and was appearing pro se, was asked to perform the herculean task of filing an amended complaint which stated "with particularity" the numerous facts and details which Judge Bonsal apparently felt were required of a sufficient pleading alleging fraud in this circuit, while at the same time Sloan was reading various law books in trial practice and procedure so that he could adequately represent himself in a complicated injunctive proceeding brought by the S.E.C. It should be noted that in S.E.C. v Sloan, supra, Sloan had been represented by counsel until a few weeks prior to the trial of that action at which time Sloan's counsel asked to withdraw from that case. Because of these circumstances, Sloan had no way of knowing in advance that he would be required to draft an amended complaint for Judge Bonsal while at the same time being required to prepare for a trial before Judge Ward. Although Judge Bonsal was perhaps not aware of this conflict when he announced his directive on November 19, 1973, he became aware of it later when Sloan made a request in writing for additional time to file the amended complaint. Judge Bonsal did not grant this request for additional time and subsequently dismissed the complaint with prejudice for failure to meet the twenty day limit. It is submitted that this was unfair and prejudicial and the decision by Judge Bonsal should be reversed.

^{13.} This is an over simplification. What happened between Sloan and his counsel is a matter of record and does not require a detailed discussion here. However, it should perhaps be noted that Judge Ward refused to grant Sloan's counsel leave to withdraw until December 12, 1973, which was the second day of the trial of that action.

-34-

which the plaintiff failed to comply.

In dismissing the complaint sua sponte, Judge Bonsal relied on Link v Wabash R. Co. 370 U.S. 626 (1962). Reliance on that case is clearly inappropriate. There, the district court dismissed with prejudice for failure to prosecute the oldest civil case on its docket after plaintiff's counsel failed to appear for a pre-trial conference, this being only many the most recent of/similar actions. Furthermore, plaintiff's counsel failed to move for relief from judgment as he could have done through the "escape hatch" provided by Rule 60(b) F.R. Civ. P. Id. at 632. Even there, the Supreme Court affirmed in a 4-2 decision which evoked a sharp dissent. Mr. Justice Black stated in his dissenting opinion:

"Moreover, it seems plain to me that any attempt to cut down on court congestion by dismissing meritorious lawsuits is doomed to fail even in its misguided purpose of promoting speed in judicial administration. Litigants with meritorious lawsuits are not likely to accept unfair rulings of that kind wihout exhausting all available appellate remedies. Consequently, any reduction of trial court dockets accomplished by such dismissals will be more than offset by the increased burden on appellate courts. This case seems to me an excellent example of the sort of wholly unnecessary waste of judicial resources which can result from such overzealous protection of trial court dockets. The case has twice been before the Court of Appeals and has twice been brought to this Court as a result of "timesaving" rulings handed down by the trial judge." Id.at 649

Mr. Justice Black aptly concluded:

"I fear that this case is not likely to stand out in the future as the best example of American justice."

The reasons given by Mr. JusticeBlack in his dissenting opinion are certainally appropriate here. It took Judge Bonsal five months, from December 29, 1973 until May 30, 1974,

Moreover, it appears that the fact that the defendant filed his complaint 19 days late was not the real reason for the dismissal. In the last page of his decision, Judge Bonsal states that "had the final amended complaint been filed within the period directed by the court it would have" been dismissed anyway. However, Judge Bonsal did not give the reason for which the complaint "would have" been dismissed and one can only guess as to what his reason was. Therefore, this court is faced with a burdensome appeal which should not have come before it in the first instance. United States v John Anthony Taylor 487 F. 2d 307 (2d Cir. 1973).

vi

THE DECISION OF THE COURT BELOW MUST BE REVERSED AS BEING ARBITRARY AND CAPRICIOUS.

Although District Court judges are generally accorded great latitude in the exercize of their discretion, it would be a mistake to permit a district court judge such great latitude

that he could almost dismiss a complaint because he felt like it. To do so would, among other things, deprive the plaintiff of his First Amendment constitutional right to petition the government for a redress of grievances. The dismissal of a complaint with prejudice is a serious matter and must be based upon sound reasoning. Clearly, there is nothing sound about Judge Bonsal's reasoning in this case. Therefore, the district court's decision must be reversed.

It should be noted here that the plaintiff contends that he did not make any procedural errors although he may perhaps have filed an amended complaint later than the time that the court would have wished that he do so. However, assuming arguendo that the plaintiff made a procedural error during the course of this litigation, that would not provide the basis for a dismissal with prejudice. The Supreme Court, in Haines v Kerner 404 U.S. 519 (1972), stated that the allegations of a pro se complaint should be held to less stringent standards than that of a formal pleading drafted by lawyers. In Jackson v Statler Foundation 496 F. 2d 623 (2d Cir. 1974) this court applied Haines and held that although there was "confusion" in the briefs and in the complaint of the pro se plaintiff and the claims of the plaintiff appeared to be lacking in substance, the complaint should have not been dismissed.

^{14.} And incidently, by sheer happenstance, the Rev. Jackson may have opened a whole new area of litigation by choosing to appeal the dismissal of his pro se complaint.

In New York State, under the CPLR, a complaint may not under any circumstances by dismissed due to an error in procedure. In those courts it is probably correct to say that the only procedural error which has any permanence is the failure to serve and file timely a notice of appeal and even that error can be corrected under CPLR 5520. This aspect of the CPLR acknowledges the fact that parties who appear by counsel are known to make errors in procedure and no prejudice should occur to their clients as a result.

Moreover, there are constitutional limitations on the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on ther merits of his cause. Hovey v Elliott 167 U.S. 409; Hammond Packing Co. v Arkansas 212 U.S. 322; Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v Rogers 357 U.S. 197 (1958). This principle was applied by this court in Flaks v Koegel 504 F. 2d. 702 (1974) in which a decision by a district court to enter a default judgment was reversed.

vii

VARIOUS DEFENDANTS IGNORED PROCEDURE AND FAILED TO COMPLY WITH THE RULES OF THE SOUTHERN DISTRICT OF NEW YORK.

Judge Bonsal's opinion places great emphasis on procedural errors which were supposedly made by the pro se plaintiff. However, from an examination of the original record of this appeal it can be seen that it was the defendants and not the plaintiff that ignored the rules of civil procedure.

From the beginning of this litigation a pattern was established of looseness and informality to the point that the rules of the court were ignored by almost all of the defendants. For example,

defendant AMEX treated this lawsuit with distain. One would expect vigorous opposition from the AMEX. Instead, the AMEX provided no opposition whatsoever.

Unfortunately, there is/nothing worse than an adversary who refuses to fight back.

When defendants CJV and S & P moved to dismiss the original complaint, defendant AMEX "joined" in this motion by submitting an affidavit which stated that it was endorsing the arguments advanced by CJV and S & P. At the same time defendant AMEX failed to serve and file a timely notice of motion giving the plaintiff the required ten days notice. No memorandum of law as required by Rule 9(b) of the General Rules for the Southern District of New York was ever submitted by the AMEX. When Sloan filed a second complaint under a second index number, the AMEX simply failed to move, answer, or otherwise respond. On January 11, 1974, the AMEX submitted an "affidavit in support of motion to dismiss" without a notice of motion and again without making service the required ten days in advance. Later, Sloan moved for summary judgment against the AMEX. Defendant AMEX responded with a one page statement that it did not need to respond to a motion for summary judgment while motions to dismiss were still pending. However, defendant AMEX did not itself have a motion to dismiss pending. Altogether, defendant AMEX submitted a total of seven sheets of paper none of which were addressed to the merits of this litigation. Thus, the statement made in the opinion of the court that defendant AMEX moved to dismiss pursuant to

Rule 12(b) F.R. Civ. P. is incorrect. Defendant AMEX never moved to dismiss in accordance with the applicable rules.

Specifically, Rule 6(d) F.R. Civ. P. requires that there be a notice of motion. Rule 9(b) of the General Rules for the Southern District of New York requires that the moving party file with the motion papers a memorandum of law. Rule 9(c)

(2) of the General Rules for the Southern District of New York requires that the notice of motion and accompanying memoranda of law be served at least ten days before the return date of the motion. Defendant AMEX failed to comply with any of these rules.

Defendant AMEX was not the only defendant that failed to comply with the rules. Rule 5(a) F.R. Civ. P. requires that "every written motion--- and every written notice--- shall be served upon each of the parties." None of the defendants-appellees who made motions complied with this rule. As noted previously, a total of nineteen attorneys ultimately appeared in this case. Apparently, none of them ever went to the office of the docket clerk to find out who each other were. The proof of service attached to most of the motions presented generally indicated that three or four other attorneys were served. Only after the plaintiff moved for reargument with a notice of motion containing a listing of all counsel that had appeared in this case did the various defendants respond with papers which were served upon all of the other attorneys.

The fact that the defendants did not serve motion papers on each other contributed greatly to the confusion which characterized this litigation. For example, only two attorneys appeared for oral argument on November 19, 1973. Counsel for defendant Loeb was supposed to be present but presumably forgot to show up. Apparently, few, if any, of the remaining counsel knew that motions were to be argued on this day. Therefore, they were in a position to complain when Judge Bonsal directed the plaintiff to file an amended complaint. In other words, had certain defendants served their motion papers properly in the first instance, none of the remaining defendants would have had a right to complain that they had suffered prejudice by the actions of Judge Bonsal. In turn, Judge Bonsal would not have overcompensated by acting in a manner prejudicial to the plaintiff.

II

THE AMENDED COMPLAINT OF DECEMBER 29, 1973 DOES STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND DOES MEET THE PLEADING REQUIREMENTS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND THE LAW OF THIS CIRCUIT.

Nowhere in his opinion does Judge Bonsal state that the amended complaint of December 29, 1973 was dismissed for failure to state a claim. Furthermore, none of the defendants-appellees advanced the argument that the amended complaint failed to state a claim. It is submitted that the adequacy of the amended complaint as a whole is so manifestly obvious that

a detailed discussion of the various features of the complaint is not required. In addition, since none of the defendants-appellees argued otherwise in the district court, it is hard to determine what arguments might be advanced by these defendants-appellants on appeal. With a few exceptions, the instant brief does not attempt to anticipate arguments which will be made by the defendants-appellees.

On the last page of his opinion, Judge Bonsal states that:

"Had the final amended complaint been filed within the period directed by the court, it would have been dismissed as to all of the defendants except CJV, Doyle and Wismer, and stayed as to these defendants pending final determination of the S.E.C. action (73 Civil 5074)."

This part of Judge Bonsal's opinion is not appealable.

In principle, what Judge Bonsal would have done is of no interest to this appellate court. However the inclusion of this extraneous sentence in Judge Bonsal's opinion leads one to suspect that there was an ulterior motive in Judge Bonsal's decision to dismiss the complaint under the circumstances. It is submitted that the ulterior motive probably lies in the desire of Judge Bonsal to have an appellate court determine certain controlling questions of law before proceeding forward with this action. The proper way to do this would be for the district court to certify a controlling question of law under 28 U.S.C. 1292(b). However, this route undoubtedly would not have been available (see Slade v Shearson, Hammell & Co., Inc.

F. 2d. (2d Cir. decided 12-16-1974)) particularly under the circumstances of this case.

Judge Bonsal's opinion leaves the unmistakeable impression that the real reason the complaint was dismissed was not because the amended complaint was not timely filed but rather because Judge Bonsal felt the plaintiff's case would ultimately fail for other reasons, perhaps for reasons stated in other portions of his decision. Specifically, Judge Bonsal expresses the view that the doctrine of "unclean hands" would preclude the defendant from maintaining this action. Furthermore, Judge Bonsal says that the amended complaint does not allege causation in fact. On this latter point, some decision is necessary.

The original complaint was filed on September 4, 1973. At that time, the plaintiff in person was not in a position to be aware of the theory of causation in fact mainly because the most important case on this point, Shapiro v Merrill, Lynch, Pierce, Fenner & Smith, Inc. 495 F. 2d 228 (2d Cir. 1974) was seven months later. not handed down until April 3, 1974, or After the original complaint was filed, defendant CJV moved to dismiss on several grounds including the grounds that Sloan had not relied on the allegedly false and misleading statements made by CJV. This was an appropriate argument in view of the prevailing case law in this circuit at that time. In fact, one of the cases cited in the defendants' motions to dismiss was Shapiro v Merrill, Lynch, Pierce, Fenner & Smith, Inc. 353 F. Supp. 264 (1972)/reviewed by the Court of Appeals in the decision cited above. Therefore, the theory upon which the

plaintiff sued seemed, at the time, an attempt to break
new gound in the area of securities litigation. The principal
theory upon which the complaint of the plaintiff was based
was that CJV and others made false and misleading statements
which resulted in a rise in price in shares of CJV which in
turn resulted in injury to the plaintiff. The plaintiff never
alleged that he relied on the truth and accuracy of the false
and misleading statements of CJV in deciding whether or not to
buy and sell CJV shares. On the other hand, Sloan never alleged
that he knew all along that the information disseminated by
CJV was false and that he was attempting to capitalize on a
fraud.

A few days after the Court of Appeals decision in Shapiro v Merrill, Lynch, Pierce, Fenner & Smith, Inc. supra, Sloan filed a brief in which he asserted that the complaint stated a claim based upon the theory of causation in fact.

It is submitted that the failure of the complaint to contain the specific words "caused in fact" is a mere technicality since it is abundantly clear from reading the amended complaint that causation in fact is what the plaintiff was alleging even though the pro se plaintiff was perhaps unfamiliar with the term at the time the amended complaint was written. In fact, Judge Bonsal's own summary of the complaint leads to this conclusion when it states:

"With respect to his alleged injury, plaintiff alleges that while he was in a short position, the price

concerning claims of technical deficiencies in the amended

of CJV stock on the American Stock Exchange ("AMEX") went up by reason of allegedly false press releases, stockholders' letters, and the annual report issued by the company and its officers and by reason of the publication of articles in newspapers, financial advisors newsletters, and a mining industry trade journal; and that he was unable to cover his short position because of the conspiracy of the defendants, including AMEX, brokers, and broker-dealers, in not honoring his orders to buy."

Although the last clause incorrectly states what Sloan actually alleged it is submitted that this sentence taken from Judge Bonsal's opinion sets forth a cause of action under a theory of causation of fact. It is further submitted that the doctrine of in pari delicto or "unclean hands" does not apply to the circumstances of this case and that any other deficiencies in the complaint, if there are any, are mere technicalities and do not affect the merits of plaintiffs claim as a whole.

i

THE DOCTRINE OF "IN PARI DELICTO" OR "UNCLEAN HANDS" DOES NOT PROVIDE A DEFENSE IN THIS CASE.

In its brief discussion of the doctrine of "unclean hands" the opinion of Judge Bonsal cited <u>Kuehnert v Texstar</u>

<u>Corporation 412 F. 2d 700 (2d Cir. 1969). A more recent decision, James v Du Breuil 500 F. 2d 155 (5th Cir. 1974), has elaborated on the application of this doctrine.</u>

In both <u>Kuehnert</u> and <u>James</u> the fraud of which the plaintiff complained arose from a transaction in which both plaintiff and defendants were active participants in the fraud he or, at least, the plaintiff believed that was scheming with the defendant in an effort to defraud others. Furthermore, the fraud would not have been possible without the participation of the plaintiff. In both cases "plaintiff voluntarily agreed to join defendant in what seemed a mutually profitable plan to violate the securities laws prohibiting insider trading within a certain period of an announced merger." When the insider trading proved to be unprofitable, the plaintiff sued his former co-conspirator.

that the doctrine of "in pari delicto" as set forth in <u>Kuehnert</u> can be applied to the circumstances of this case. Judge Bonsal states in his opinion that it appears that the plaintiff knew of the fraud and did not attempt to impart his knowledge to other investors while at the same time attempting to capitalize on the fraud. Judge Bonsal apparently believes that this circumstance would act as a bar to recovery by the plaintiff.

In Slade v Shearson, Hammill & Co., supra this court refused to decide a controlling question of law in the abstract and it is submitted that it do so here particularly since the assumptions on which Judge Bonsal sets forth his claim of "unclean hands" have no basis in fact. Judge Bonsal seems to assume that Sloan went to Panama, looked at the CJV copper

drilling sight, decided that a fraud was being perpetrated, sold short 33,400 CJV shares, and thereafter attmepted to blow the whistle to no avail.

Whether Sloan, had he done what Judge Bonsal seemed to think he did, could invoke the protection of the anti-fraud laws is an interesting question in the abstract. However, it does not apply to the facts of this case for several reasons one of them being that Sloan did not go to Panama and examine CJV's copper drilling sight until after he had sold short the CJV shares and after he had sustained losses as a result.

Furthermore, irrespective of the particular facts of the principle this case, / that the plaintiff must come to court with

"unclean hands" could not possibly apply here. None of the parties have alleged that Sloan was at any point a co-conspirator with CJV in a mutual effort to defraud others. To the contrary, Sloan was at all times hostile to the interests of CJV. CJV was issuing false and misleading press releases for the purpose of causing the price of CJV shares to rise. Sloan meanwhile was selling short shares of CJV which would have the

^{15.} This circumstance if proven would compare with the activities of Raymond J. Dirks in the so-called Equity Funding scandal with the difference being that after Dirks had arranged for the sale of several hundred thousand shares of Equity Funding Corp. and after he got around to telling the S.E.C. about it, the S.E.C. believed Dirk's story and immediately suspended trading in Equity Funding Corp. thereby establishing profits for Dirk's customers.

effect, at least temporarily, of applying downward pressure to the price of CJV shares. Thus, Sloan could not possibly be "in pari delicto" with CJV.

Moreover, to conclude that Sloan knew that CJV was committing a fraud and that Sloan decided to sell short 33,400 CJV shares as part of a plan to capitalize on that fraud would be to assume that Sloan believed himself capable of predicting the future. In the light of subsequent events, it is easy to conjecture that Sloan sold short CJV shares based upon a premeditated calculation that at some point the fraud which CJV was perpetrating would become unravelled, that the S.E.C. would suspend trading and that Sloan would realize a handsome profit from his short selling. However, it is apparent from the complaint that this is not what occured. During the two months which preceded the filing of the complaint in the district court. Sloan acted like a man who was caught up in the sweep of events over which he had no control. The fact is that Sloan was caught in a vicious "short squeeze" and was absolutely powerless to prevent himself from suffering a hugh financial loss.

It is submitted that the facts of this case, which are alleged with particularity in the complaint, fully set forth a cause of action and certainally do not establish grounds for an in pari delicto theory of defense. Moreover, as to Sloan's possible knowledge and/or participation, it is self-evident that Sloan could not have had he been so stupid as to sell short 33,400 shares of CJV/known that afoot there was a conspiracy/between CJV, the AMEX, Dow, The Miami Herald and other named defendants to bring about a rise in price of CJV shares.

Peripherally, it is worth noting that at oral argument one of the defendants seemed to be contending that Sloan was barred from recovery because his short sales were improper in the first instance. Specifically, it was claimed that Sloan had violated the "uptick" rule: S.E.C. Rule 10a-1. However, none of the defendants briefed this point. In any event, it is appropriate to point out that even assuming arguendo that Sloan did violate the "uptick rule," such a rule violation could not have any proximate cause to the injury which occurred when the price of CJV shares rose. The simple fact is that a violation of the "uptick rule" can only occur when the price of a security goes down in connection with a short sale. But, in the case at the bar, it is alleged that injury was sustained because the price of CJV shares went up in connection with the short sale. Thus, a violation of the "uptick rule," if it occurred, would be immaterial in determining liability. Furthermore, a violation by Sloan of the "uptick rule" would not be sufficient to impose liability upon Sloan because no fraud is involved. See Colonial Realty Corp. v Bache & Co. 358 F. 2d 178 (2d. Cir. 1966), cert. denied 386 U.S. 817 (1966); Pearlstein v Scudder, 429 F. 2d 1136 (2d Cir. 1970).

It should be noted that, in the context of this lawsuit, Sloan is to be considered as a customer although he was also a registered broker dealer. In re Naftalin & Co. 315 F. Supp. 463 (D. Minn. 1970); 333 F. Supp. 136 (D. Minn. 1971); 469 F. 2d 1166 (8th Cir. 1972). In Avery v Merrill Lynch 328 F. Supp. 677 (D.C. Cir. 1971), a suit by a customer to recover a loss occasioned where the broker had sold short at the customers request but without the required margin deposit in the customers account, the court stated:

"The court will not entertain a cacophony of blame on the part of the brokers and customers -- each blaming the other for not meeting the requirements-- the ultimate responsibility must be placed somewhere and congress has indicated that it is with the broker dealers." 328 F. Supp. at 681.

Avery further observed:

"To allow the broker to plead contributory negligence or causation by the customers as the reason for a violation would remove the very heart of the legislation, for in every case a violation the dealer could be heard to assert participation." 328 F. Supp at 680.

In his discussion of the doctrine of in pari delicto Judge Bonsal cited a second case: Chris Craft Industries Inc. v Independent Stock Comm. 354 F. Supp. 895 (1973). However that citation is inappropriate. Chris Craft involved an action primarily for equitable relief in which the parties were suing each other in the aftermath of a hard fought proxy contest. Both sides contended that the other side had violated the S.E.C.'s proxy rules. The district judge agreed and stated that since both parties were guilty of illegal conduct the court would not lend its aid or grant equitable relief to either party. This case serves to emphasize the point that the doctrine of "unclean hands" is and always has been applied in actions for equitable relief. Equitable relief has always been considered by the courts to be an extraordinary remedy. Clearly, the standards which apply in an action for equitable relief are not the same as those which apply in an action for money damages. It has been held, for example, that "fraud has a broader meaning in equity than at law." S.E.C. v Capital Gains Research Bureau 375 U.S. 180, 194 (1963).

In any event, it is submitted that the holding in <u>Kueh-nert</u> is erroneous. It should be observed that the <u>Kuehnert</u> court expressed grave doubts about its own decision when that decision was made, noting that since the information conveyed

Kuehnert was fraudulent, Kuehnert knew nothing and therefore had no knowledge to convey to others. In the case at the bar, CJV had been suspended from trading by the S.E.C. in 1971 and 1972 and its chief executive officer, Doyle, had been to jail more than once. Therefore someone could undoubtedly argue that the fact CJV has committed acts of fraud is itself a matter of public knowledge. Therefore, the result of the application of the doctrine of "unclean hands" to this case would be that CJV would have absolute immunity from suit for fraud in all cases. Other than Kuehnert and James it does not appear that the doctrine of in pari delicto has ever been applied to a suit for monetary damages. It is submitted that it should not be applied here and probably not anywhere. One of the principal draftsmen of the Exchange Act, in summing uf §9(c) which, without significant alteration, became the present \$10(b), stated that: "Subsection (c) says, 'Thou shalt not devise any other cunning devices.'" If the courts were to adopt the principle of Kuehnert one could commit a fraud and still be immune from suit by employing the "cunning device" of luring the intended victims into the belief that they were participating in the fraud. It is submitted that clearly Congress did not intend that under \$10(b) CJV and its co-conspirators would be immune from suit for fraud under the doctrine of "unclean hands." Even assuming arguendo that Sloan defrauded unknown third parties, the proper remedy would be for those third parties to sue Sloan and not for CJV to prevail on its argument that Sloan was guilty of some wrongdoing wholly unrelated to the illegal activities of CJV. It should be noted that CJV has not indicated a desire to interpose a counterclaim against Sloan. Therefore, absent a counterclaim, the law of this case should be that the only issues before the court are the illegal activities of CJV and the other named defendants.

THE FACT THAT THE BUSINESS OF CERTAIN DEFENDANTS DEPENDS
ON THE TRUST AND CONFIDENCE OF THEIR CLIENTS DOES NOT GIVE THEM
ANY HMMUNITY, QUALIFIED OR OTHERWISE, FROM SUIT.

On page 17 of his opinion Judge Bonsal expressed a view has which he apparently/expressed in other opinions which is that when allegations of fraud are made against those whose business depends on client's trust and confidence the plaintiff must set out more completely than in an ordinary complaint the factual circumstance that allegedly entitle him to relief.

It is submitted that this remarkable view is entirely contrary to every fundamental principle of fair play to litigants. To begin with, the general requirement that a complaint alleging fraud must allege specific facts of questionable constitutionality. It is entirely possible that the victim of a fraud can know that he has been defrauded without being able to allege "with particularity" what the fraud is. For example, if a company publishes a certified balance sheet on Monday showing a considerable net worth and borrows money based upon this balance sheet and on Tuesday declares bankruptcy, the lendor should undoubtedly be permitted to sue for fraud immediately even though it would be too early to be able to allege "with particularity" what the fraud is. It is submitted that for this reason Rule 9(b) F.R. Civ. P. as applied by Judge Bonsal is unconstitutional.

Relative to this point it should be noted that the reason this action got bogged down at the pleading stage was that the various defendants argued that the allegations of fraud were not pleaded with sufficient particularity. Thus, when plaintiff was

bonsal stressed the need to have a complaint which allleged facts which demonstrated a fraud "with particularity." Thus, the plaintiff was put to a considerable effort without many of the defendants having to lift a pencil. The end resultwas that unless the decision below is reversed, the plaintiff has been put out of court by the "particularity" requirement of Rule 9(b) which is, among other things, obviously unconstitutionally vague.

Turning to the statement by Judge Bonsal that when alleging fraud by an accountant the complaint must plead fraud with greater particularity than in an "ordinary" complaint, it should be said that one can hardly imagine a rule more unjust. Under normal circumstances, the accountant would or should be in a better position than anyone else to know precisely what the fraud is. Imagine the unfairness of the result if a plaintiff correctly alleged fraud by an accountant, but, not having the benefit of discovery under the F.R. Civ. P., was not correct in his statement of precisely what the fraud was. If that were to happen, the accountant would be able to have the complaint dismissed "with prejudice" and a great wrong would be allowed to go unremedied.

This is an appropriate argument to make here because, in the case at the bar, CJV has undoubtedly committed a highly of sophisticated and complex fraud, not/the garden variety type. The plaintiff should not be thrown out of court because it took him four complaints before he was able to plead fraud "with particularity." Rather, he should be commended because the final amended complaint states in exacting detail precisely what the fraud is. Now that the plaintiff has gone to the considerable

effort of drafting the complaint, the defendants should be required to answer for the first time as most will be doing if this appeal is remanded.

Furthermore, the claim that accounts and others are entitled to qualified privileges and/or immunities should be put to rest by the court. Obviously, the only way to insure the integrity of the accounting profession is to make accountants liable whenever they lend their names to a false and misleading balance sheet.

As to the "others" the claim that they are entitled to a qualified immunity from suit as necessary to protect their integrity is equally without basis. In Merrill, Lynch v Ware 414 U.S. 117, 136 (1973) the Supreme Court considered an argument that in order to insure public confidence in securities markets it is necessary that grievances involving stock brokerage firms not be aired in public. The Supreme Court, in rejecting this argument, stated:

"There is no explination why a judicial proceeding, even though public, would prevent (sic) lessening of investor confidence. It is difficult to understand why muffling a grievance in the cloakroom of arbitration would undermine confidence in the market. To the contrary, for the generally sophisticated investing public, market confidence may tend to be restored in the light of impartial public court adjudication."

It is submitted that this citation is appropriate here and that, in order to insure public confidence in securities markets as well as for the reasons previously stated, plaintiff should be permitted to offer proof showing that Dow, the AMEX and the other "respectable" defendants have participated in the fraud by CJV.

iii

THE ARGUMENTS THAT THERE ARE TECHNICAL DEFICIENCIES IN THE COMPLAINT ARE WITHOUT MERIT.

On page 3 of his opinion Judge Bonsal seems to critize the plaintiff for alleging neither"the dates of each of plaintiff's transactions nor the price at which the shares were purchased or sold by plaintiff. However, there is no requirement that such allegations be included in the complaint. In Stromillo v Merrill, Lynch, Pierce, Fenner & Smith, Inc. 54 F.R.D. 396 (1971) Judge Weinstein rejected such a contention, and rebuked the defendant for making such a claim stating that:

"We note that this motion [for a more definite state-ment] has, without any useful purpose, expanded several times the thickness of an otherwise slim file with motion papers, memoranda of law and affidavits. Litigants should avoid burdening the courts, themselves and their adversaries with excess paperwork."

Clearly, the words of Judge Weinstein are appropriate to the instant case where a tremendous quantity of verbage was produced in the district court, very little of which is pertinant to the questions involved in this appeal.

Another argument advanced in the district court was that plaintiff had not met the requirements of the "in connection with" language of Section 10(b) of the Exchange Act. In essence, the argument was that plaintiff had failed to allege that each purchase and sale occured "in connection with" a false and misleading statement. On this point, defendants cited the so-called Birnbaum Rule, which was recently made the law of the land in Blue Chip Stamps v Manor Drug Stores U.S. ___, 44 L. Ed. 2d 539. The simple answer to this argument is found in S.E.C. v Capital Gains Research Bureau, supra at 195 and again in Affiliated Ute Citizens v United States 406 U.S. 128, 151 (1972) where the Supreme Court stated that securities legislation is to be construed "not

technically and restrictively, but flexibly to effectuate its remedial purposes." In essence, the defendants argued that Sloan must show a direct causal connection between each and every purchase and sale and every false and misleading statement. However, it has never been the rule that a plaintiff show that each transaction was caused in fact by a fraudulent statement. Rather, the rule is that it must be shown that the injury was caused in fact by the fraud. It should be noted that the case at the bar involves more than 100 separate transactions spread over a period of several months (A-194, ¶ 21) and a large number of fraudulent press releases. Frequently, Sloan bought and sold shares of CJV on the same day. Any attempt to tie a particular transaction to a particular press release would have no relevance since the thrust of the complaint is not that the fraudulent press releases caused in fact Sloan to buy and sell shares of CJV but rather that these press releases caused in fact the price of CJV shares to go up which in turn caused in fact injury to Sloan because Sloan happened to be a short seller of CJV shares.

It should be noted that in Sloan's affidavit in support of his motion for summary judgment as to defendant Edwards, Sloan went into considerable detail describing his trading in CJV. This affidavit stated that on January 3, 1973 Edwards set up a position of 8,300 shares of CJV in a stock loan account with Sloan and that this loan was marked at \$6 per share which was the prevailing market price at the time (A-262, ¶ 7). Thus Sloan owed Edwards 8,300 shares of CJV and Edwards owed Sloan \$49,800. Sloan also effected additional short sales to bring his entire short position in January, 1973 to 9,500 shares (A-263, ¶ 7). Thereafter, on

April 24, 1973, Edwards sent Sloan a mark to market demanding that Sloan pay to Edwards the sum of \$16,600 representing the fact that CJV was selling for \$8 per share on that date (A-263, ¶ 10). Eventually, Sloan paid Edwards \$8,300 and Edwards bought in Sloan at a price of \$7 on the AMEX (A267, ¶ 20). Meanwhile, Sloan was selling more shares short through other brokers and, commencing with July 5, 1973, the price of CJV shares started its meteoric rise.

It should be evident from this that the short sales effected by Sloan were not brought about by a carefully thought out plan to sell short 33,400 CJV shares but rather by technical factors and economic pressures on Sloan. Sloan started out with a short position of 9,500 shares. As the price of CJV rose, he sold more. When the price of CJV fell he bought back again in an effort to cover his short. In so doing, Sloan was merely attempting to recoup or at least to minimize his earlier losses. However, this strategy proved to be Sloan's undoing when the price of CJV commenced to rise straight up. The end result was approximately \$170,000 in trading losses of which Sloan was able to satisfy only about \$45,000. (A-116, ¶ 247). The aftermath was that brokers with whom Sloan dealt who were named as defendants were either suing or threatening to sue Sloan for the remaining \$125,000.

It is submitted that there is unquestionably a lawsuit here and that the courts should decide this case rather than avoid it. The complaint puts directly into issue the question of who should bear the losses involved. Undoubtedly, there are losses, as evidenced by the counterclaim by Bache & Co.

for \$31,000 and by the fact that Sloan is being sued in the state courts. To refuse to permit Sloan to litigate this case in the federal courts would condemn him to litigate in courts which have no jurisdiction to Consider questions of federal securities law and to deny forever his right to assert his claims against CJV and other wrongdoers. Surely, this would be an unjust result. Furthermore, when a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take jurisdiction. Sugar v Curtis Circulation Co. 377 F. Supp. 1055 (1974).

It is well established that under \$10(b) and Rule 10b-5 knowing assistance of or participation in a fraudulent scheme gives rise to liability equal to that of the perpetrators themselves even if that assistance consists merely of silence or inaction. Strong v France 474 F. 2d 747, 752 (9th Cir. 1973); Anderson v Francis I. Du Pont & Co. 291 F. Supp. 705, 709 (D Minn. 1968); Brennan v Midwes rn Life Ins. Co. 259 F. Supp. 673, 682 (N.D. Ind. 1966); Kerbs v Fall River Industries, Inc. 502 F. 2d 731 (10th Cir. 1974). Furthermore, the Supreme Court has, in a number of decisions, explained the intent of the securities laws in such a way as to require that the plaintiff prevail in this lawsuit. See Affiliated Ute Citizens v United States, supra at 151; Supt. of Insurance v Barkers Life & Cas. Co. 404 U.S. 6, 12 (1971); S.E.C. v National Securities, Inc. 393 U.S. 453, 463 (1969); Tcherepain v Knight 389 U.S. 332, 336 (1967); S.E.C. v Capital Gains Research Bureau, supra at 195.

It is submitted that the answers to any other arguments

concerning claims of technical deficiencies in the amended complaint can be found in the Supreme Court's decision in Scheuer v Rhodes 416 U.S. 232, 236 (1974) which stated:

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."

Finally, it should be pointed out that since the date that Judge Bonsal rendered his opinion, a change of circumstances has occured in that plaintiff is not a resident of New York State but instead is a resident of the State of Virginia and therefore, on remand, the plaintiff would be in a position to allege diversity jurisdiction and therefore would no longer be required to predicate his claim of common law fraud on pendent jurisdiction.

III

THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO ENJOIN THREE RELATED STATE COURT PROCEEDINGS.

In the district court the plaintiff moved to enjoin all related state court proceedings. At that time there were six such proceedings but since that time three have been discontinued by stipulation. The three that remain are: Edwards & Hanly v Sloan; Pressman, Frohlich & Frost v Sloan and Weis & Baer, Inc. v Sloan. Each of these lawsuits involved a broker-plaintiff to or through whom Sloan allegedly sold short and failed to

deliver shares of CJV. Edwards alleged that it purchased 4,000 shares, Pressman alleged that it purchased 1,000 shares and Weis & Baer alleged that it purchased 2,000 shares. The three plaintiffs combined demanded total damages of approximately \$16,000.

Each of these lawsuits involve questions of federal securities law. For example, paragraph 4 of the complaint filed by Edwards in the Supreme Court of the State of New York (A-289) alleged the following:

4. "Thereafter, and on or about August 14, 1973, defendant was advised by the Market Surveillance Division of the American Stock Exchange that sales made by defendant were not long sales but were actually short sales made in violation of the Securities Exchange Act of 1934. Upon receipt of such advice, plaintiff attempted to contact defendant to learn if defendant was in a position to deliver 4,000 shares of Canadian Javelin stock either at the time the sales were made or at that time."

By this pleading, Edwards raised an issue which was considered by the court in a different context in Gordon v New York Stock Exchange 498 F. 2d 1303 (2d Cir., 1974) cert.

granted _____ U.S. ___, 42 L. Ed. 2d 291 concerning the applicability of State and federal law in cases involving regulation by a stock exchange.

In essence, Edwards has contended that because of a communication from the AMEX, Edwards was not required to follow the normal custom and practice in the securities industry of sending a buy-in notice and was permitted to buy-in Sloan without notification either before or after the buy-in occured. In particular, Edwards contended that Sloan had violated S.E.C. Rules 10a-1 and 10a-2 as well as Section 7 of the Exchange Act (15 U.S.C. 78g) and Regulation T promulgated thereunder and that therefore the

normal laws of contract did not apply. Sloan contended that he had not violated any rules of the S.E.C. and the Federal Reserve Board and that, even if he did, Edwards had known for a long time that Sloan was short selling and Edwards had profited from Sloan's short selling activities in the past and that if the allegations by Edwards were true, then all of the contracts in question were void under section 29(b) of the Exchange Act (15 U.S.C. 78 cc(b)).

During a two day trial on October 30 and October 31, 1974, Supreme Court Judge Shanley Egeth deemed as admitted in the of the complaint pleadings ¶ ¶ 2 and 3/(A-288) and ¶ ¶ 13, 14, 15, 16, 17 and those parts of 18 and 19 of the answer and counterclaim which alleged that Sloan had demanded the return of the 1000 shares and this demand had been refused. (A-293/4).

After a two day trial, Judge Egeth rendered a decision which is included as an exhibit to the appendix (A-355-365).

On appeal, the ppellate Division - First Department modified in a two page decision (A-368-9). A notice of appeal has been filed and the appeal is presently in the process of being perfected to the State of New York Court of Appeals.

It is submitted that the decision of the Appellate Division First Department is clearly erroneous and involves an improper
adjudication of matters involving the Exchange Act which are subject
to the exclusive jurisdiction of the federal courts under \$27 of
the Exchange Act (15 U.S.C. 78aa). It is further submitted that
to the
all further proceedings related/lawsuit in the New York State courts
should be enjoined.

The error of the Appellate Division - First Department can be seen from its statement that:

"Once it became apparent that defendant had, on his own behalf, engaged in short selling, as prohibited in the account,

which defendant maintained with plaintiff, the latter acted properly in buying-in."

However, the accouragreement, which Edwards claimed that Sloan had violated states.

"Broker or Ler Special Omnibus Account Gentlemen:

The undersigned broker or dealer request that you carry a special omnibus account for the undersigned pursuant to Section 220.4(b) of Regulation 4 issued by the Board of Governors of the Federal Reserve System under the Securities Exchange Act of 1934.

The under signed represents that he is a member of a national securities exchange or is registered with the Securities and Exchange Commission under Section 15 of the Securities and Exchange Act of 1934.

The undersigned further represents (1) that the securities and the short sales in such special omnibus account are within the meaning of Rule 8c-1 and Rule 15c2-1 under the Securities and Exchange Act of 1934,----"

Clearly, by deciding that Sloan had violated this account agreement, the Appellate Division was adjudicating a matter of federal securities law and therefore further proceedings should be enjoined by this court.

There is no doubt that under Section 21(e) of the Exchange Act (15 U.S.C. 78u (e)) this court has the authority to enjoin further state court proceedings in this case. A private party can invoke §21(e) on the authority of J.I. Case Co. v Borak 377 U.S. 426, 432 (1964) which held that a private suit is "a necessary supplement to Commission action." The power of the federal courts to enjoin state court proceedings is limited only by the Federal Anti-Injunction Act, 28 U.S.C. 2283. In Mitchum v Foster 407 U.S. 225, 237 (1972), the Supreme Court cited with approval the holding by this court in Studebaker Corp. v Gittlin 360 F. 2d 692 (2d Cir. 1976) that the Exchange Act provides one of the recognized statutory exemptions which permits the federal courts to enjoin state court proceedings.

It is submitted that the case at the bar falls with a each

of the three of the specifically defined exceptions of 28 U.S.C. 2283. Not only is an injunction "expressly authorized by an Act of Congress" but it is necessary in aid of the jurisdiction of this court, as well as necessary to protect or effectuate its judgments. Capital Serv., Inc. v NLRB, 347 U.S. 501 (1954), 1 Moore ¶ ¶ 0.208 [3.-4] and 0.225. If this action is remanded to the court below, and if the New York State Court proceedings are not enjoined, the district court will be forced to be concerned with the progress of any proceedings in the state courts and no doubt jurisdictional problems will arise. For one thing, the district court will be required to decide whether the doctrine of res judicata applies when the state courts have decided matters of federal securities law or have determined the rights and liabilities of the respective parties based upon the transactions which are being litigated in the federal courts in this lawsuit. Furthermore, if the New York state court proceeding is not enjoined, Sloan, if he loses in the State of New York Court of Appeals, will be forced to seek review by the Supreme Court of the United States of the adverse state judgment. 1 Moore ¶ ¶ 0.208 [3.-3] and 0.224.

In Atlantic Coast Line R.R. v Brotherhood of Locomotive

Engineers 398 U.S. 281, 295 (1970), the Supreme Court explained

§ 2283 by stating:

"both exceptions to the general prohibition of §2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide the case."

It is submitted that the case at the bar is precisely the kind of case where such an injunction is necessary. On this point it should be observed that ¶243 of the amended complaint (A-115) is virtually identical to ¶¶13, 14, 15, 16, 17, 18 and 19 of the answer and counterclaim Sloan filed in the state court

-63-

proceeding (A-293/4.). Thus, if the state court proceeding is not enjoined, Edwards will undoubtedly argue, as it has argued already, that the same facts cannot be re-litigated in the federal forum.

In the district court, Edwards, Pressman and Weis & Baer Inc. relied upon Jennings v Boenning & Co. 482 F. 2d 1128 (3rd Cir. 1973) and Vernitron Corp. v Benjamin 440 F. 2d 105 (2d Cir. 1971). However, those cases, which were also relied upon by the plaintiff, are of no aid to the defendants. In Jennings, the the third circuit decided that the state courts had not adjudicated a matter of federal securities laws since the state court had done nothing more than enter a judgment by confession based upon a promissory note. There, the court noted that "it is hornbook law that the courts of Common Pleas of the State of Pennsylvania have jurisdiction in proceedings to enforce promissory notes." Furthermore, the Jennings court observed that six years has passed since the entry of the judgment by confession. It concluded that a judgment obtained six years prior to the filing of a claim in the federal courts could not "seriously impair the federal courts flexibility to decide the case."

In <u>Vernitron</u> this court denied injunctive relief because
Benjamin was not "engaged or about to be engaged" in violations
of the Exchange Act by prosecuting suit in the state courts. However, in the case at the bar, the complaint alleges (1) that the
shares of CJV are unregistered in violation of the Securities Act
of 1933 and (2) that the broker defendants violated various provisions of the Exchange Act and that therefore the contracts in
question are void under \$29(b) of the Exchange Act. Therefore,
by proceeding against Sloan in the state courts, defendants Edwards
Pressman and Weis & Baer are attempting to enforce contracts

made in violation of the Exchange Act. It is submitted that this circumstance satisfies the "engaged or about to be engaged" criteria. Therefore, the three state court proceedings in question should be enjoined.

IV

THE DISTRICT COURT ERRED IN DENYING THE MOTION TO CONSOLIDATE.

In the district court, Sloan moved to consolidate 73 civil 3801 with 73 civil 4403 and also moved to consolidate both cases with S.E.C. v Canadian Javelin Ltd. 73 Civil 5074. In its opinion dated May 30, 1974, the district court denied these motions.

To begin with, the decision not to consolidate 73 Civil 3801 with 73 Civil 4403 was so obviously erroneous that little discussion is required. None of the defendants objected to the consolidation of these two actions. The appeal before this court is unnecessarily complicated by the fact that the district court failed to consolidate the two lawsuits in question. In fact, this brief is actually arguing two appeals at the same time. 16

As to Sloan's motion to consolidate his actions with the action brought by the S.E.C., it should be pointed out that all of the arguments advanced by the S.E.C. in opposing the motion in the district court were rejected in a per curiam opinion by a seven member Judicial Panel on Multidistrict Litigation, In re

National Student Marketing Litigation 368 F. Supp. 1311, 1317 (1973).

The defendants in this case who opposed Sloan's motion to consolidate all seemed to base their opposition on the presumption that they would suffer from prejudice because of the fact that would be sitting across from the S.E.C. For example, one of the defendants argued (A-177):

^{16.} This is proper because consolidation of these appeals has been ordered by this court.

"(6) If these actions are consolidated, the disproportionate guilt of certain defendants may well prejudice and inflame a court and/or jury against defendants."

It is submitted that there is little to commend such an argument. This argument assumes that juries are lacking in intelligence and that judges are incapable of conducting a fair and impartial trial. In order to prevail on such an argument, the defendants must overcome "a presumption of honesty and integraty in those serving as adjudicators," Withrow v Larkin ____U.S.____, 43L. Ed. 2d 712 (1975) and the defendants have not done that in this case. Therefore, the motions to consolidate should not have been denied.

V

THE DISTRICT COURT ERRED IN FAILING TO REACH THE OTHER MOTIONS PRESENTED INCLUDING THE MOTIONS BY PLAIN-TIFF FOR SUMMARY JUDGMENT.

It is almost superfluous to say at this point that the district erre failing to reach the other motions presented. However, it should be pointed out many of the motions which the district court failed to decide go to the merits of this lawsuit and therefore it is within the appellate jurisdiction of this court to dispose with many if not most of the questions of fact and law in this case.

To begin with, none of the defendants have argued that CJV did not make false and misleading statements. In fact, some of the defendants have come very close to admitting that CJV is "guilty". On this point, it should be observed that according to an article in the Wall Street Journal dated October 30, 1973, CJV admitted that its earlier statements concerning its mineral concession were untrue (A-237). In addition, the argument advanced by CJV that Sloan knew of the fraud and therefore possessed "unclean hands" contains a virtual admission that there was a fraud.

The defense of the defendants who briefed this issue seemed

to be in all cases that they did not know of or participate in the fraud.

For example, according to the cross motion for summary judgment by The Miami Herald, the articles about CJV which were published in that newspaper were written by Colin Hale, an independent stringer who was also the editor of a daily English newspaper in Panama. (A-169). The thrust of the argument advanced was that The Miami Herald did not know that the information contained in the newspaper article was untrue and that, therefore, The Miami Herald was not liable.

It should be observed that the affidavit in support of the motion by The Miami Herald contained nothing more than self-serving statements concerning facts which were unknown and unknowable to Sloan. (A-159) Furthermore, the newspaper articles in question do not appear to be examples of responsible journalism but appear to have been written solely for the purpose of inducing persons to buy shares of CJV. (A-162/3).

It is submitted that since the Miami Herald does not dispute the fact that the newspaper articles were false and misleading, it is therefore liable to plaintiff under the principle of respondent superior, Lanza v Drexel & Co. 479 F. 2d 1277 (2d cir. 1973) (en banc). It is further submitted, however, that an important question such as this should be decided by the district court in the first instance and that therefore this action and the other motions for summary judgment should be remanded to the

^{17.} The Miami Herald also asserted that it was protected by the First Amendment right to Freedom of the Press. However, this argument was asserted as an affirmative defense in its answer and did not form a part of the motion by The Miami Herald for summary judgment.

However, it is worth noting that none of the defendants have disputed any of the operative facts which are alleged in the verified amended complaint, that all of these facts are either known or knowable to one or the other of the various defendants, that there was ample opportunity to contest the factual allegations in the district court, and that this is no jurisdictional barrier to this court deciding that summary judgment should be granted in favor of the plaintiff at this time.

In the district court, Sloan also moved for summary judgment as to Edwards. The operative undisputed facts there are as follows:

In July, 1973 Sloan sold short 4000 shares of CJV through Edwards. On August 14, 1973, without notice to Sloan, Edwards bought-in the 4000 shares on the AMEX. On August 15, 1973, not realizing that he had been bought-in the previous day and believing that he was still failing to deliver the 4000 CJV shares to Edwards, Sloan called the office of the cashier at Edwards and asked permission to make a late delivery of 1000 CJV shares in return for immediate payment of approximately \$13,000. Edwards agreed to accept the late delivery and agreed to pay Sloan \$13,000 almost simultaneously therewith. However, when Sloan delivered the shares, the clerk at the receive window told Sloan it would take about an hour to prepare the check. When Sloan returned to his office while waiting for the check, the partner in charge of cashiering at Edwards called Sloan, informed him that the shares had been bought-in the previous day, and stated that Edwards would not return the shares to Sloan nor would Edwards pay Sloan for

the shares unless Sloan paid to Edwards the sum of \$6611.42. Sloan refused to pay Edwards and Edwards retained the shares. On August 15, 1973 CJV was trading at 13. On September 14, 1973 CJV was trading for 18. The shares have never been returned to Sloan nor has Sloan received any value therefor.

It is submitted that on these facts, which are not in dispute, Sloan is entitled to a judgment against Edwards in the amount of either \$13,000 or \$18,000. See German v. Snedecker, supra.

VI

THE DISTRICT COURT ERRED IN DENYING SLOAN'S MOTION FOR RELIEF FROM JUDGMENT, FOR REARGUMENT AND FOR LEAVE TO FILE AN AMENDED COMPLAINT.

After Judge Bonsal rendered his decision dated May 30, 1974, Sloan moved for relief from judgment, for reargument and for leave to file an amended complaint. This motion was denied without opinion on June 17, 1974 (A-352).

In Flaks v. Koegel, supra this court reversed a default judgment which had been entered when the defendant failed to answer interrogator es. After consideration of the facts that court stated:

"We need not agonize over this because the terminal stage of the pretrial skirmish provides a clear case of judicial abuse of discretion which warrants several and remand." 504 F. 2d at 711

This led the court to the conclusion that it should reverse the denial of the Rule 60(b) motion which reversalwould have of the effect/granting the appellant all the relief that he was seeking.

In the case at the bar, Sloan moved on June 4, 1974, or

three days before judgment was entered for an order "reversing the opinion of the court." Although Sloan cited Rule 59 in his notice of motion, the motion was essentially identical to a motion under 60(b).

It is submitted that the denial of this motion was a final abuse of judicial discretion which warrants reversal. If Judge Bonsal had changed his mind at that point all of the parties would have been spared a difficult and burdensome appeal.

CONCLUSION

For all of the reasons, set forth above, the decision of the district court should be reversed and remanded.

Respectfully submitted,

Samuel H. Sloan Plaintiff-Appellant pro se

APPENDIX

I. U. S. Constitution Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

II. The Securities Exchange Act of 1934,

Section 10(b):

- (10.) It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --
- (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 27:

The district courts of the United States, the district court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendent is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28 , secs. 225

and 347). [Note.- Sections 225 and 347 of Title 28 of the U.S. Code were repealed by the Act of June 25, 1948, Sec. 39, Public Law 773, 80th Congress, effective September 1, 1948. Provisions similar to those contained in Sections 225 and 347 are now contained, respectively, in Sections 1254 and 1291-1294 of Title 28 of the U.S. Code. See \$\(\)60,302-60,314. CCE. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

Section 29:

- (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.
- Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation: Provided, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 15 of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 15 of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within 3 years after such violation. [As amended by Act of June 25, 1938, 52 Stat. 1076.]

Federal Anti-Injunction Act 28 U.S.C. 2283:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. (June 25, 1948, c 646 §1, 62 Stat. 968.)

S.E.C. Rule 10b-5:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

- (a) to employ any device, scheme, or artifice to defraud,
- (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

STATE OF NEW YORK
:
COUNTY OF RICHMOND

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20th day of August, 1975 deponent served the within brief upon the following parties at the addresses indicated:

LEONARD TOBOROFF, 400 Park Avenue, NYC
THE LAW FIRM OF MALCOLM A. HOFFMAN, 12 East 41st St., NYC
STROOCK, STROOCK & LAVAN, 61 Broadway, NYC
ABRAHAM L. BIENSTOCK, 30 Broad St., NYC
OLITT, FRIEDBERG & KAGEL, 200 Park Ave., NYC
BRESSLER, MEISLIN, TAUBER & LIPSITZ, 90 Broad St., NYC
LUNNEY & CROCCO, 20 Exchange Place, NYC

SIBBERFELD, DANZIGER & BANGSER. 250 Park Ave., Nyc SATTERLEE & STEPHENS, 277 Park Ave., NYC LARRY GRIMES, 500 North Capital Street, Washington, D.C. DIAMOND & GOLOMB, 99 Park Ave., NYC

BOOTF & BARON, 122 East 42nd St., NYC

LORD, DAY & LORD, 25 Broadway, NYC

PATTERSON, BELLKNAPP & WEBB, 30 Rockefeller Center, NYC SULLIVAN & CROMWELL, 48 Wall St., NYC DELSON & GORDON, 230 Park Ave., NYC BUTOWSKY, SCHWENKE & DEVINE, 230 Park Ave., NYC CRAVATH, SWAINE & MOORE, One Chase Manhattan Plaza, NYC BREED, ABBOTT & MORGAN, One Chase Manhattan Plaza, NYC

which constitute all of the attorneys for the respondents in this action and are the addresses designed by said attorneys for that purpose by depositing two (2) true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to befor me, this 20th day of August; 19/5/

WILLIAM BAILEY

Notary Public, State of New York No. 43-0132945

Qualified in Richmond County Commission Expires March 30, 1976